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The Madras Law Journal

VOL. XXVI] JANUARY, 1914. [PART I

THE LATE MR. JUSTICE P. R. SUNDARA AIYAR.

It is with profound regret that we have to record the death, on the 21st of December last, of Mr. Justice Sundara Aiyar, who was one of the founders of this journal and continued to be one of its editors for a period of 20 years. He was born in June 1862 at Pudukode, a village near Palghat. His parents belonged to a very humble station in life, and he had to contend with poverty during the scholastic period of his life. The success he achieved during his academic career and in life was entirely due to his own intellectual endowments and force of character. He was one of the most distinguished graduates of the Madras Christian College and was a favourite of Dr. William Miller, the famous Educationist of Southern India. He took up logic and philosophy as his special subject for the B. A., degree and was a tutor in that subject for a period of 2 years after graduation. The habit of logical reasoning and close analysis and the remarkable facility in exposition that he acquired during this period were of the greatest possible value to him in his legal studies and in his future career. He pursued the study of law with ardour, and during his two years' course for the B. L., degree laid the foundation of a knowledge of law as deep as it was broad. He passed the B. L., examination with distinction and became an apprentice under Sir (then Mr.) Subramaniya Aiyar, who was then occupying a foremost position in the Madras Bar. It may be said that his apprenticeship under Sir S. Subramaniya Aiyar was the turning point of his career and that his struggle with poverty then came to an end. Sir S. Subramaniya Aiyar was quick to recognise the talents of his pupil and generous in his appreciation. Sir Subramaniya Aiyar lost no opportunity of helping his pupil and warmly commending him to his large *clientele* throughout the

Presidency. Junior engagements fast came to Mr. Sundara Aiyar almost from the date of his enrolment. Sir Subramaniya Aiyar had so much confidence in the abilities of his distinguished pupil that when he was not able to attend personally to his cases, he often handed them over to Mr. Sundara Aiyar. Mr. Sundara Aiyar had not to wait long before he acquired an independent footing in the profession. His close association with Sir Subramaniya Aiyar during these early years was attended with the most fruitful intellectual intercourse. It was during this period that an informal association was formed in Mylapore for the purpose of discussing topics of law. The association included all the leading lights of the Bar and the most promising juniors.—Sir V. Bashyam Iyengar, Sir S. Subramaniya Aiyar, Mr. C. Ramachandra Rao Saheb, Mr. C. R. Pattabirama Aiyar, Sir C. Sankaran Nair, Mr. T. Subba Rao, Mr. P. S. Sivaswami Aiyar, Mr. V. Krishnaswami Aiyar, Mr. P. R. Sundara Aiyar, and Sir V C. Desikachariar. The members met every Saturday noon at Sir Subramaniya Iyer's house at the Luz, and the decided cases in the Indian Law Reports were the subject of discussion. Every decision of importance was thoroughly dissected, examined and discussed in all possible aspects. No decision of a doubtful or questionable character was passed over unchallenged. No deference was paid to any decision that could not be supported by an appeal to principles. It need hardly be said that the weekly discussions were of a most stimulating character and promoted thought and study. The gathering was looked forward to as an intellectual feast. Mr. Sundara Aiyar used to take a prominent part in these debates. It was at this time that the idea of starting the Madras Law Journal was conceived, and it was decided to commit the undertaking to the care of Mr. Salem Ramaswami Mudaliar, Mr. C. Sankaran Nair, Mr. V. Krishnaswami Aiyar and Mr. P. R. Sundara Aiyar. Several of the leaders and the critical notes in the Journal in the early years of its existence owed their inspiration to the weekly discussions. Mr. Sundara Aiyar's editorial connection with the Law Journal helped not a little to spread his reputation as a lawyer. When Sir S. Subramaniya Aiyar was elevated to the Bench of the High Court in 1895, a large portion of his practice was divided between Mr. Sundara Aiyar and Mr. V. Krishnaswami Aiyar. Mr. Sundara Aiyar's position in the Bar had, by this time, been thoroughly well-established and more briefs poured in upon him than he could conveniently accept. Thoroughly conscientious worker as

he was, his engagements compelled him to work at very high pressure and left him little time for rest or physical exercise. Mr. Sundara Aiyar was naturally endowed with a robust constitution, and like the late Mr. Krishnaswami Aiyar and other men similarly endowed, he committed the fatal mistake of ignoring physical limitations and imagining that his constitution could stand the strain of any amount of work. The strenuous work of these years undermined his hardy constitution, and he contracted the disease to which so many educated Indians become victims. As an advocate, Mr. Sundara Aiyar was distinguished for the thoroughness with which he prepared his cases, the care he took to arrange the facts, the lucidity with which he presented them and the readiness with which he met his opponents' points. The skilful presentation of a case is an art which is but little attended to but which Mr. Sundara Aiyar carefully cultivated. He had a very exacting conception of the equipment of an advocate, and he conscientiously and successfully strove to reach his own high ideals. He had an excellent delivery and a powerful and well-modulated voice to which it was a pleasure to listen. There was little literary embellishment in his style, but he spoke with a directness and a force and earnestness which made every sentence tell upon his hearers. His manners towards his opponents were generally dignified and free from unpleasantness. With his talents and advocacy, he had no difficulty in commanding the respectful attention of every Judge with whom he had to deal. He had a high sense of duty to his client. When the late Mr. V. Krishnaswami Aiyar was elevated to the Executive Council, Mr. Sundara Aiyar's appointment to succeed him gave universal satisfaction. He had all the qualifications required to achieve judicial eminence, and the courtesy and patient hearing that he accorded to the practitioners who appeared before him were most marked. He was ambitious of leaving a name as a great Judge and his judgments are marked by erudition, research, subtlety and exhaustiveness. It is a matter for deep regret that his judicial career came to an abrupt close so soon and that he was not allowed to realise his ambition to the fullest limit. His interests were not confined to his professional labours. He took great interest in education and his services on the syndicate of the Madras University were handsomely acknowledged by the Vice-chancellor Sir John Wallis. In the sphere of political activity, he was an active worker in the Madras Mahajana Sabha and the Congress Committee and his outlook was that of sober and

thoughtful patriotism. His death is an irreparable loss to the High Court he adorned and to the legal profession whose interests he had always at heart. His lectures on 'Professional Ethics' were not the least valuable of his services to the legal profession. From the conductors of this Journal a deep debt of gratitude is due to the memory of the distinguished Judge who has passed away.

The Madras Law Journal

VOL. XXVI] JANUARY, 1914. [PART IV

THE ADMINISTRATION OF CIVIL JUSTICE IN THE MADRAS PRESIDENCY.

The Administration of Civil Justice in the Madras Presidency during the year 1912 presents some features which deserve serious consideration. The number of suits instituted during the year was 484662. The figure though striking is by no means an indication of any abnormal craving for the pastime of litigation. Excluding the area within the jurisdiction of the Original Side of the High Court, the ratio of institution to population was 1 to 85. This does not argue as has been hinted at in certain quarters either that the people have become more litigious or that the increase in the number of practitioners has led to the fomenting of costly litigation; on the other hand, the fact that excluding suits withdrawn or compromised 75 out of every 100 persons who went to Court succeeded in their claims shows that litigation was necessary. One inference that can be drawn is that the people have become poorer: for if a defendant has no defence, it is because he is unable to meet the demand in time that he is sued. Another inference that can be drawn is that owing to the inordinate time taken up in litigation in Indian Courts, and the difficulties of creditors in realizing their dues, debtors are emboldened to set up any defence so that the evil day may be put off as much as possible. Another noticeable feature of the year's report is that there have been 16 temporary Subordinate Judges, and a dozen temporary District Munsiffs; the number of temporary Sub-judges has been increasing from year to year. It is extra-ordinary that until very recently no serious attempt was made to examine into the necessity for their continuance. Mr. Phillips who has been on special duty submitted his report some months ago. It is said that his views are now before the Government. We must point out that a report of this kind ought to be placed on the Editor's table before the Government passes final orders on the subject. The people have a right to know what the recommendations are and how far they should be supple-

mented or varied. There can be nothing confidential in a report dealing with the necessity for an increased judiciary and the Government will gain in strength and prestige, if the people are taken into its confidence. The various Bar associations are entitled to submit their suggestions on the report of the Commissioner: and the Government will be in a position of greater security, if criticism is invited. Comments *ex post facto* can serve no good purpose in matters of this nature. While on this subject, we must draw the attention of the Government to the urgency there exists for rearranging the proportion of the various grades of Sub-judges. Temporary appointments secure an advantage from the point of view of Government. All of them are in the lowest grade, whereas if there is a permanent staff, there must be a readjustment of the grades. We hesitate to believe that the delay in making their appointments permanent is due to any such feeling. The present arrangement has been fruitful of hardship to an over-worked and deserving class of Subordinate officials and we venture to hope that the order of the Government will carry out the work of fixing the proportion of the various grades at once. These remarks apply *mutatis mutandis* to the Munsif's Courts.

We have been under the impression that the question of increasing the pay of the Munsiffs and of the Sub-judges was engaging the attention of the High Court and of the Government; We are sorry that the obvious duty which the Government is under to these subordinate judicial officers should have been so long in incubation. The best intellects of the country are given to the work of judicial administration, and it is much to be regretted that neither the High Court nor the Government has shown greater appreciation of the excellent work done by them. We do not find in this year's Government order even the formal acknowledgment of the good work done by these officers as used to be the case hitherto. We press upon the notice of the learned judges of the High Court and upon the Government the reasonableness of the demand for increased pay to Munsiffs and Sub-judges and hope that it will not be long before their just claims are recognised. In this connection, we must not omit to notice that the pay of the members of the Provincial Service serving as District Judges should be increased. As was said before the Public Service Commission recently in Calcutta by a European witness, this difference in pay has a tendency to stamp the recipient as possessing an inferior status. Moreover as from this class of officials promotions are made occasionally to the High Court, the comparative disparity between the two salaries makes the present conditions of pay very anomalous.

Notwithstanding the large number of temporary Courts the average duration of suits showed a tendency to rise. It is undisputed that our Subordinate judicial officers give the best of their time and energy to the disposal of the work before them. They do not spare themselves and very often wreck their lives in the race to cope with their heavy work; and yet arrears have been accumulating. There is but one answer to this state of affairs. The number of Munsiffs and Subordinate judges should be considerably increased. We sometimes hear, although we are glad to note that this is not a prevailing sin, that cases are very summarily dealt with in order that a clean balance sheet may be shown. We have no regard for a judge who puts his prestige and prospects of promotion above considerations of well-considered and evenhanded justice. To persons of this bent of mind, we would recommend the perusal of the excellent observations of Sir Arnold White at the recent Bar Dinner. At the same time, the Government is under an obligation to the public to see that temptations of this kind are not placed before judicial officers. The Government is bound to see that suitors do not come out of court disheartened and dispirited, because the presiding officer is not able to find the time requisite for the consideration of the case before him. And we sincerely hope that the number of tribunals will be so increased that there may be no room for indulging in hasty disposals. In England, if a case is prolonged beyond six months, there is a great outcry for increase in the number of judges. In this Presidency we find that the average duration of a suit in a Munsiff's Court was 245 days, in the District and Subordinate Judges' Courts, 349 days and in the High Court (Original side) 592 days. As regards appeals the average duration in the District and Subordinate Judges' Courts was 226 days, and in the High Court, it was 657 days as regards first appeals and 603 days as regards second appeals. The figures are appalling and not only for what is plain on the face of it, but still more for what lies behind. When an average is spoken of, it implies that some very old cases are pending: we know that there are appeals of 7 years' duration still on the file of the High Court. Sometimes appeals very recently filed are taken up, while old sores remain undressed. We believe it is so in the Lower Courts. The cases involving serious issues and demanding larger attention are laid aside and those of easier complexion are dealt with. It is because the judiciary is very much undermanned and the authorities are believed to attach importance to the disposal that such a course of procedure is rendered possible: we are not sure that the true significance of this deplorable condition of the arrears is realised in the proper quarters. It is

denying justice to ask a man to wait for two, three, and four years before he is given a hearing. When one has to remember the chances of appeal, of second appeals, and of the difficulties in execution, it is wonderful how patient the Madras suitor is. We hope the Honourable Judges of the High Court and the Government will take such steps as will considerably minimise the evil we have alluded to.

The Government has been able to realise a surplus of over 25 lakhs of rupees from litigation: and yet the printing and translation charges in the High Court continue to be prohibitive and the pay of the clerks of the various grades of Courts continues to be unsatisfactory. We do not think that the Government should consider litigation as a source of Revenue. If there has been a larger income from the courtfees, it is incumbent upon the Government to see that greater facilities are given to suitors to have speedy and satisfactory justice. The undermanning of the clerical establishment has been adverted to in the Legislative Council. The inadequacy of the pay of the Amins and process-servers was also discussed. There has been no indication that the Government is alive to the necessity for a careful enquiry into the matter.

The Government draws the attention of the Collectors to the remarks of the Judges of the High Courts on the working of the Estates Land act. We venture to think that it is the Government that has to weigh the observations and not the Collector. When the Estates Act was under discussion, every endeavour to entrust the cases to the ordinary civil tribunals was resisted by the Government mainly on the ground that speedier justice was possible in the Revenue Courts. That dream has not been realised. The parties have had to suffer great hardships by being obliged to go from camp to camp with all their witnesses. This is not all. Even for filing cases, the parties have to move from camp to camp and are made to wait the pleasure of divisional officers. Naturally enough, the Deputy Magistrate pays less attention to the disposal of these Revenue cases than he does to criminal cases and to ministerial revenue functions. His training is against hearing both sides and taking down depositions. The result has been very unsatisfactory to the litigant public. Far from being a summary and inexpensive court, litigation in the Revenue Court even for petty sums has proved to be more costly and protracted than litigation in the civil courts. Now that the Act is about to be revised, we hope the Government may find it possible to remove most of these cases from the jurisdiction of Revenue Courts and to vest them in the

ordinary Civil Courts or to invest Munsifs with powers of Divisional Officers for the purposes of the Madras Estates Land Act.

Before we close this examination of the judicial administration of the Presidency, we must express our great regret that for a number of years, the Judges of the High Court have not been able to find time to inspect the Subordinate Courts. Periodical visits of this nature have a double value. They keep the Courts in order instead of engendering in them a belief that they are uncontrolled. They have an educative value in that it will enable the inspecting judge to understand the difficulties of a subordinate tribunal. This will also enable the High Court to apply its mind to remedying the defects existing in the Courts under their superintendence.

THE MALABAR MARRIAGE AND INHERITANCE BILL.

(*Continued from* 25 M. L. J. 244.)

In a former article while considering the restrictions imposed by the Bill in the matter of contracting *Sambandams* we did not advert to one matter which requires to be made clear. Nair ladies may contract Sambandams with persons who have a different personal law. For instance, *Sambandams* with Nambudries are very common. The question is whether the scope of the Bill covers such cases or if not whether it is desirable to extend its scope to such cases also. According to S. 1 cl. (a) the Act extends to the whole of the Madras Presidency and to the followers and descendants of such followers of the Marumakkathayam or Aliyasantana Law residing elsewhere and who have not adopted the law of their domicile. According to this clause the Bill applies to all followers of the Marumakkathayam Law whether they be Hindus or Mahomedans. People who are governed by the Hindu Law will not come under this description. We take it also that although the Nambudri may be said not to be governed by Hindu Law as regards the management and alienation of property he cannot be said to be a Marumakkatayam Hindu within the meaning of S. 3 of the Bill or a follower of the Marumakkatayam law within the meaning of S. 1 cl. (b). It will, therefore, appear that the object of the author of the Bill is not to include Sambandams contracted by such persons. If this be his object it has not been carried out. S. 3 states that the *Sambandham* of a Marumakkatayam or Aliyasantana Hindu subject to the restrictions herein contained shall be deemed to be a valid legal marriage for all legal purposes. The section speaks only of the *Sambandham* of a Marumakkatayam Hindu. There is nothing either in this section or in any other

NOT TO BE ... DEPARTMENT OF LAW

section to show that it is essential that both parties to the *Sambandham* should be Marumakkatayam or Aliyasanthana Hindus and cl. (c) which only states that the parties should not belong to the different communities between the members of which, according to custom or usage applicable to either community, cohabitation is prohibited favors the view that both parties need not be Marumakkatayam or Aliyasanthana Hindus and that it is enough if one party is of the latter class while the other may be a Hindu belonging to a community whose members are by custom permitted to cohabit with the Marumakkatayam or Aliyasanthana Hindus. Although S. 3 excludes the case of Marumakkatayam Mahomedans, still in the view that the section does not insist upon both parties being Marumakkatayam Hindus the case of Marumakkatayam Mahomedans may also come in but for S. 3 cl. (c). Again the exception to S. 11 supports the above view. That exception provides that the provisions of the section shall not apply to persons who have a personal law of marriage and who contract a *Sambandham* under this Act except so far as the self-acquisitions of the husband are concerned. This shews that persons who have a personal law of marriage may contract a *Sambandam* under this Act. We have to observe in this connection that we do not know what the author of the Bill means by saying " contract a *Sambandam* under this Act." We hope he only means by this expression " contract a *Sambandam* which is valid under this Act" for there is no formality prescribed under this Act as under the old Act. Coming to the point on hand we may state that the exception relates to persons who are governed by Hindu Law and thus have a personal law of marriage. It also applies to others but we are not concerned with them just at present. The question, however, is whether Nambudries who are junior members of an illom and who contract *Sambandams* with respectable Nair ladies can be said to be persons who have a personal law of marriage. In Wigram's Malabar Law 1st Ed. page 3, it is stated: " In order to maintain the rule of impartibility among the Brahmins it is customary for the eldest only of several brothers to marry whilst the younger brothers are permitted to form temporary alliance with Sudra women." It was thought that by this custom the junior members were prohibited from contracting valid marriages. This, however, has been shewn to be erroneous. See *Pappi Anterganam* v. *Tayyan Nayar.*[1] Such Nambudries will, therefore, satisfy the exception.

1. (1903) 14 M. L. J. 214.

Acc. No.
Date

If Nambudries can, under the law in Malabar, validly contract *Sambandham*, we do not see any reason why they should not come under the Bill and be declared as such. We also think that the Bill should carry out the consequences flowing from such declaration and declare the children born of such marriages to be legitimate with all the consequences flowing from such legitimacy under the Hindu Law. If it is said that the Nambudri or other person who contracts such *Sambandams* and is allowed by other members of his family to contract such *Sambandams* will object to the declaration of legitimacy we have no hesitation in thinking such objections to be unreasonable and inequitable in the interests of the off-spring. It cannot be that the objection to declaring the offspring to be legitimate is on any religious, moral or legal ground. Under the Hindu Law texts marriages among members of different classes (though not in the inverse order) were perfectly valid and legal and the children born under such marriages were legitimate and had certain rights. Such marriages have become obsolete in Northern India and in the East Coast. But among the Brahmins of the West Coast chiefly among the Nambudris many other practices allowed by the sacred texts but since become obsolete in the East Coast still prevail. This practice of Nambudri Brahmins contracting Sambandams with Nair ladies is apparently on the basis of the texts allowing marriages among members of different castes. If there is a valid union created between the Nambudri Brahmin and the Nair lady by the *Sambandham* then there can be no objection whatever to the offspring of such union being regarded as legitimate. If, however, it is not a valid union it is immoral and we think a declaration that it is such, is perfectly reasonable and the sooner it is done the better it is in the interests of morality. The Nambudri cannot for the purpose of satisfying his conscience regard the union erected by the *Sambandam* as valid and moral but regard the offspring arising from such union as otherwise than legitimate.

We cannot, therefore, understand the scope of the exception to S. 11 of the Bill. S. 11 applies only to a person governed by this Act. The persons governed by this Act are according to S. 1 cl. (b) the followers and the descendants of such followers of the Marumakkathayam or Aliyasanthana law. They cannot be said to be persons who have a personal law of marriage within the exception and they do not come within the scope of the section at all. As regards the descendants of the followers there may be two classes. They may be (1) descendants of persons contracting *Sambandams* both parties to which are followers of Marumakkatayam or Aliyasantana

Law or (2) they may be descendants of persons contracting *Sambandams* one party to which is governed by Marumakkatayam or Aliyasantha Law while the other is not governed by such law but by some personal law. The Act does not declare by what law this latter class of descendants is governed. Are they to follow the law of their mother or the law of their father? A similar question has arisen in the case of Moplas. We must say that the decisions of our High Court on this question are unsatisfactory and no consistent general principle can be evolved from them. We may have to discuss the cases on this subject on a future occasion. It is far better that the Act specifically enacts some provision relating to this. Upon general principles and upon the analogy of principles prevailing in other systems of law we think that a declaration that such descendants of the 2nd class are governed by the law of their father is only proper and reasonable. That of course will not prevent such descendants claiming interest in their mother's property or in their mother's tarwad. If it be said that the exception refers to the case of Mopla Mahomedans who are governed by Marumakkatayam law we cannot understand why there should be this exception and the further exception to the exception so far as the husband is concerned.

A writer from North Malabar whose article we publish in this journal in the next issue thinks that the author of the Bill forgot altogether the Moplahs of North Malabar. Be this as it may we think the language of the several provisions of the Bill requires considerable modification.

NOTES OF INDIAN CASES.

The Special Officer Salsette Building Sites v. Dossabhai Bezonji Mottiballa.—I. L. R. 37 B. 506.—In this case their Lordships of the Bombay High Court hold that an appeal does not lie to His Majesty in Council from the decision of the High Court on appeal under S. 54 of the Land Acquisition Act. Their Lordships followed the recent decision of the Privy Council in *Ranjpon Bota-toung Company Ltd.* v. *The Collector of Rangoon*[1] which was a case relating to an appeal from the Chief Court of Lower Burmah. In a note on this Privy Council case a view was expressed in the columns of this journal that the decision of the Privy Council negativing the right of appeal to the Privy Council in Land Acquisition cases should be confined to the case before their

1. (1912) I. L. R. 40 C. 21.

Lordships. The Bombay High Court would seem to think otherwise and reserve to the Privy Council the right of distinguishing its former decision. We thought that the decision of the Privy Council should not be taken as negativing the right of appeal from the decision of a High Court or other Court of final appellate jurisdiction under S. 54 of the Land Acquisition Act and if the Privy Council has decided it otherwise we should think that it is wrong. The Bombay High Court considers itself to be bound by the decision of the Privy Council and we find that their decision is supported by the decision of the Privy Council when this case was taken before it. See *The Special Officer Salsette Building Sites* v. *Dasabari*[1]. The matter is therefore concluded by the highest judicial authority and it would serve no useful purpose to show how their decision is wrong. It is, however, highly necessary that there should be an appeal to the Privy Council and that the Legislature should intervene by inserting such a provision in the Land Acquisition Act.

Srinivasa Sarjerar v. Balwant Venkatesh.—I. L. R. 37 B. 513.—We agree with the decision of the Bombay High Court that the decision of the Privy Council in *Tribuvansingh* v. *Rameshwar Batt*[2] is not conclusive on the question of limitation as to the applicability of article 118, but in the view of the finding of the judges that the adoption was valid no question of limitation would arise and their decision is only *obiter*. We cannot, however, agree that the Bombay view is correct but apparently the question seems to have been concluded there by a decision of the Full Bench in *Srinivas* v. *Hanumant*[3]. There can be no question that under articles 118 and 119 of the present Limitation Act the Full Bench decision of the Bombay High Court will have no application.

Karibasavana v. Veerabhadrappa.—25 M. L. J. 3. The point raised in this case is one of first impression in this country and so far as one is able to see there is no English authority either on the point. Plaintiff's right of way was obstructed. He claimed damages for the loss of crops on the land which he said he had to keep waste in consequence. It was found that another route though circuitous and somewhat hazardous was available. The question was: whether he ought to have availed himself of that route and avoided the damage? The question as put is open to the obvious answer that he owed no duty to the defendant. But their

1. (1913) 17 C. W. N. 421. 2. (1906) I. L. R. 28 A. 727.
3. (1899) I. L. R. 24 B. 260.

Lordships (*Sundara Aiyar* and *Sadasiva Aiyar* JJ.) point out that the basis of the rule as to avoiding or mitigating damage is not any duty owed to the wrong-doer but the fundamental principle common alike to contracts and torts viz., that the damage must be the direct and natural consequence of the wrong. A consequence which is avoidable cannot be said to be the direct and natural result of the wrong. If another route though more circuitous was available, the loss of crops was not the direct and natural consequence of the obstruction by the defendant. Their Lordships, accordingly, restricted the plaintiff's claim to the extra costs to which he might have been put if he had taken the circuitous route and in addition to some amount as compensation for affecting the evidence of his right. This decision extends a rule the application of which to contracts is undoubted, to torts as well,

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Parameshwara Pattar *v.* **Sridevi**.—25 M. L. J. 51.

The question in this case was whether an admission by the principal as to the amount of his liability (as agent) was evidence against the surety. Their Lordships *Sundara Aiyar* and *Sadasiva Aiyar* JJ) held it was. Reading S. 19, Evidence Act and the illustration, their Lordships' view seems to be obviously right, though the English law is different. In a subsequent case (*Appavu Chettiar* v. *Nanjappa Goundan*[1]) *Tyabji* J. finds difficulty in accepting this decision as sound. His Lordship's difficulty is this. S. 19 only says that the statement is an admission. Its admissibility must be tested by reference to S 21. An admission is under that section available only against the party making it or his representative and in favour of him only under special circumstances. The surety being neither the party making the admission nor his representative, the admission is not evidence against him. The result of this construction is an obvious failure of the intention of the legislature. But, with deference, his Lordship's view proceeds upon a wrong reading of S. 21. That section makes all admissions relevant. It goes further and says that an admission can always be proved against the party making it but that in favour of the party making it, it cannot be proved except in special cases. It does not say that an "admission" by a third party, provided of course it is an admission within the meaning of the Act, cannot be proved against a party to the suit. Being relevant and there being nothing in the Act to prevent its being proved it can be proved and would be available in evidence. The reason why S. 21 does not refer to

1. (1913) 25 M. L. J. 329.

cases coming within S. 19 is that the necessary restrictions are laid down in that section itself. Unless the section is read in the way suggested, there is also difficulty in making the admission of a person evidence against his co-owner as it undoubtedly is under the English law and was intended to be under the Indian (vide S. 18 Evidence Act.) Another reading of the section which finds favour with Messrs. Ameer Ali and Woodroffe is to give the words "against the party making the admission" an extended signification by reference to Secs. 18 to 20. Either view disposes of his Lordship's objection and seems to be necessary to avoid the intention of the legislature being frustrated.

SUMMARY OF ENGLISH CASES.

Davis v. Marrable: [1913] 2 Ch. 421.

Light—Obstruction to—Raising buildings in one direction and lowering in another—Net result, beneficial—Good defence.

In defence to a suit for damages for obstruction of plaintiff's light by raising the height of the defendant's buildings, it was contended that another part of the building had been lowered and as a result though the amount of light in one direction was diminished the amount of light from another direction was increased and the net result was favourable to the plaintiff. *Joyce* J. held that this was a good defence. His Lordship said that the case was not analogous to the case where the light the defendant relies upon as making his interference harmless is a light to which the plaintiff is not entitled as a matter of right and which might be taken away with impunity. The defendant having pleaded the existence of the light in question as a bar to plaintiff's action would not be permitted later on to justify his interference with that light on the ground that plaintiff had not acquired a right to it.

Lord Ashburton v. Pope: [1913] 2 Ch. 469.

Confidential communication—Right of the owner to prohibit use of original or copy—Admissibility in evidence, no defence to suit to restrain use.

The fact that a party has surreptitiously come by a document is no bar to its being admitted in evidence if otherwise it is admissible; vice versa, the fact that a document is admissible in evidence is no answer to a claim by the owner of a confidential communication to restrain its being published or copied.

In this case the defendant by a trick managed to secure letters from the plaintiff to his solicitor of which he took copies. Plaintiff sued to restrain the defendant from disclosing the letters or the copies. Defendant wanted to use the letters or the copies in Bankruptcy proceedings instituted against the plaintiff. They would have been very relevant in those proceedings. Defendant asked the Court not to restrain him from using them in the Bankruptcy proceedings. *Neville* J. complied with his prayer. *Held* the order of the learned judge was wrong and the injunction was to be absolute and without any exemption.

In re **Cozens Green** v. **Brisley** [1913] 2 Ch. 478.

Declaration of trust—Evidence of—Communication—Effect of—Want of entries in private accounts—Security for past debt—Voluntary—Imperfect security—Court will not help to perfect.

Where a trustee has committed default but is subsequently said to have made up the breach of trust by appropriating other securities to the trust, the question is whether he has made an irrevocable declaration of trust which is a question of fact.

In this case, the Court refused to draw that inference from mere entries in the private accounts of the trustee which were not communicated to anybody.

The fact that the appropriation is not communicated raises a strong presumption against intention to make an irrevocable declaration of trust. The inference is that silence was intended to enable the declarant to adhere to or abandon the declaration as best served his advantage for the time being.

Where security is given for a past debt it is purely a voluntary act and the Court will not assist the creditor if his security is *imperfect*.

In re **Mayall Foley** v. **Wood** [1913] 2 Ch. 488.

Will—Construction—Legacy—Misdescription.

A testator gave as legacy his "two freehold cottages, situated at Trowbridge, known as 19 and 20, Castle Street" The testator had no cottages in Castle Street though he did own two cottages, Nos. 19 and 20 in Thomas Street. He had no numbers 19 and 20 in Trowbridge other than those in Thomas Street. *Held* that it was a case of misdescription and the legatee was entitled to 19 and 20 Thomas Street.

Sobey *v.* Sainsbury: [1913] 2 Ch. 513.

Restrictive covenant—Defence to suit on—Altered circumstances—Plaintiff's and his predecessor's default.

In an action to enforce the restrictive covenant in a building scheme, it was pleaded for the defence that the plaintiff and his predecessors in title themselves had broken the covenant; secondly that the character of the neighbourhood had so altered that it would be unconscionable to enforce the covenants, *Sargant* J. held that both these were good defences and dismissed the plaintiff's suit. His Lordship held following the opinion of *James* L. J. and *Lindley* L. J. in *Erman* v. *Chapman*[1] and *Knight* v. *Symmonds*[2] that alteration of circumstances was a good ground for refusing specific performance whatever the explanation for the altered state of things might be whether it was the plaintiff's default, or for the matter of that, that of the defendant not objected to by the plaintiff.

Teofani and Co., Limited *v.* A. Teofani: *In re* Teofani and Co.'s Trademark: [1913] 2 Ch. 545 (C. A.)

"Passing off" action—Intent to deceive—Proof of person deceived not essential—Fraudulent use of name—Prohibition of—Bona fide use permitted—Trademark—Surname—Registrable if distinctive.

There is nothing to prevent a person who is setting up a trade in which there are already others of the same name from using his own name but alike from the legal and from the moral point of view a person is forbidden to use his own name in connection with the goods in such a way as to represent that the goods are the goods of somebody else of that name. If he does that, he is acting fraudulently and the court will restrain him. The court will restrain the fraudulent use of a man's name as much as any other fraud.

To succeed in an action brought for the purpose, it is not necessary to prove that anybody has been in fact deceived. It is quite sufficient if the Court comes to the conclusion that it is calculated and intended to deceive or apart from any intention to deceive, that it is calculated to deceive.

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1. (1877) 7 Ch. D. 271.
2. (1896) 2 Ch. 294.

Under the Trademarks Act a surname is registrable provided it is distinctive. But that would not prevent any person from bona-fide making use of his own name for any purpose.

In re Marke Wood, Senior: *In re* Marke Wood Junior, Wodehouse *v.* Wood: [1913] 2 Ch. 574 C. A.

Will—Construction—Referential trust—Three separate trusts —Hotch pot clause.

A testator gave three funds, one to each of his three children on trust for each child for life, on his death to such of his or her children as he or she shall appoint, in default of appointment to the children equally with a clause that if there was an appointment to any extent in favour of any of them, the portion appointed should be brought into the hotchpot. In each case there was a direction that in the event of failure of issue, the fund should go to the issue of the other children. A granddaughter of the testator became entitled to one fund by appointment, and to a portion of the other fund under the gift over. The question was whether she was bound under the hotchpot clause to bring into hotchpot the amount she got by appointment. *Held*: not. The appointment being in respect of quite a separate fund, it did not come within the hotchpot clause.

In re Beavan: Davies, Banks and Co. *v.* Beavan: [1913] 2 Ch. 595.

Executor—Retainer—Surety of testator—No right of, before payment—Restricted to debts—Opportunity to pay and secure right of retainer, permissible.

The question in this case was whether an executor could retain for a debt due from the testator for which the executor was a surety. The executor had not paid the debt when he claimed the right to retain. The estate was in the hands of a receiver appointed in the administration action brought by the creditors.

Neville J. held that he was not entitled.

The right of an executor to retain is a purely legal right which has been recognised in equity so far as it existed in law and no further and has never been extended to equitable claims except so far as they were equitable rights recognised and given effect to by a proceeding at law. The right of the surety was not such a right.

His Lordship was inclined to grant the executor an opportunity to pay up the debt and then plead his right of retainer but as this right could be exercised only in respect of assets in his hands at the time he pays the debt and there were no such assets in this case, his Lordship thought it futile to accede to the prayer.

In re **Seaton: Ellis *v.* Seaton**: [1913] 2 Ch. 614.

Will—Construction—To E for life or until she gets legacy—Terminable life estate—Reference in will to gift of legacy and income—Insufficient to enlarge estate.

A testator gave a 4th of his residue to his daughter E during her life or until she should receive the legacy under her father-in-law's will, and provided that then the 4th share and the income bequeathed to her should fall into the residue and be distributed in a particular manner. E did not get the legacy, the estate of the father-in-law having turned out insolvent. *Held*: that the words occurring in the last clause were not sufficient to confer on the daughter more than a terminable life estate; that the gift over took effect though E's estate did not terminate in the manner contemplated but by her death.

In re **Atkins: Life *v.* Atkins**: [1913] 2 Ch. 619.

Merger—Life estate—Fee simple defeasible on death without issue—Transfer of life estate to owner of—Effect of.

There was first a gift to A the testator's widow for life—the remainder to B her son in fee with an executory gift over to C if B died unmarried during A's life. A conveyed her life interest to B, but B dying unmarried, the question arose whether the gift over took effect immediately or whether it could come into effect only on the death of A. Held per *Eve* J. no precaution having been taken to keep A's life estate intact, there was a merger and the gift over took effect on the death of B.

In re **Pearce: Alliance Assurance Company *v.* Francis**: [1913] 2 Ch. 674.

Will—Construction—"Children"—"Illegitimate children"—Inclusion of—In the absence of legitimate children or when words in the will, require.

A testatrix left a legacy to the children of her brother. The brother had at the date of the will and also at the death of the

testatrix 8 children, 6 of whom were illegitimate and 2 legitimate. The mother of the illegitimate children was known and accepted in society as the wife of the brother and the testatrix also knew the children and was even fond of them. Under these circumstances the question was whether the illegitimate children were entitled to participate in the legacy. Held per *Sargant* J. not.

The word "children" means only "legitimate children;" the only two ways in which the significance of the term can be enlarged are first by showing that there are no legitimate children to whom the description can or could apply; secondly by showing from the expressions used in the will itself that illegitimate children also must be meant. When there is nothing in the will itself to show that illegitimate children are intended to be included and there are legitimate children to satisfy the terms of the will, it is not open to enlarge the significance of the term by reference to extraneous circumstances.

North Western Salt Co. Ltd. v. Electrolic Alkali Co. Ltd.

[1913] III K. B. 422 (C A).

Contract—Restraint of Trade—Breach of—Action for damages—Illegality not pleaded—Duty of Court.

The plaintiffs entered into a written contract with the defendant for the purchase of salt manufactured by them. The contract was found to be illegal as being in restraint of trade. In an action for damages for breach of contract the defendants failed to set up the illegality of the contract as a defence to the claim. Held:—that it was not necessary that the defence of illegality should be pleaded the Court being bound to deal with the illegality which was apparent on the face of the contract.

Charing Cross West End Electricity Supply Co. v. London Hydraulic Press Company. [1913] III K. B. 442.

Nuisance—Different Companies laying mains under streets—Damage to electric cables by hydraulic mains bursting—Statute—Construction—Two Acts to be construed together.

Plaintiffs a Company supplying electricity had laid their cables under certain public streets. The defendants were the owners of hydraulic mains containing water which had been laid under the same streets under statutory powers. The hydraulic mains burst in four different places and caused damage to plaintiff's cables.

There was no negligence on the part of defendants. Two of the mains which so burst had been laid under an act which did not contain the usual clause that nothing contained therein should exempt the company from liability for nuisance. The other two were laid under a later act which did contain such a clause and which also provided that the two Acts should be read and construed together. *Held* :—In an action to recover damages or alternatively as for nuisance that the doctrine of *Rylands* v. *Fletcher* applied not only to cases where the dangerous thing has escaped from defendants' land into plaintiffs' and caused damage to plaintiffs' land but also where plaintiff occupies land under a license and not under any proprietory right in the soil. *Held* :—that notwithstanding that the defendants had not been guilty of negligence, in the absence of statutory authorisation of the nuisance they were liable to pay damages. *Held* further that the effect of reading the two Acts together was to take away the privilege of not being liable for damages done by the bursting of the main in the absence of negligence and they were liable for nuisance.

Wootton v. Sievier [1913] III K. B. 499 (C. A.)

Practice—Discovery—Libel—Plea of justification—Particulars—Application for better particulars—Principles.

The plaintiff owner and trainer of race horses sued the defendants for libels alleged to have been published by them. The meaning of the publications was that the plaintiff had been guilty of gross dishonesty in the training and running of racehorses, and particularly that he conspired with other trainers and jockeys to defraud bookmakers and owners of racehorses and the public generally. The defendants pleaded an unqualified justification for the alleged libels and under a Judge's order delivered particulars of the matters of justification mentioning the number of races, jockeys and horses with the weights carried by them and names of certain trainers: The plaintiff applied for better particulars of the betting transactions which he was accused of having entered into contrary to his honour and duty. The Judge refused to order. On appeal,

Kennedy J :—stated the principles applicable to the case thus: "In every case in which the defence raises an imputation of misconduct against him, the plaintiff ought to be enabled to go to trial with full knowledge not merely of the general case he has to meet but also of the acts which it is alleged that he has committed and upon which the defendant intends to rely as justifying the imputation". "Further as a

general rule it is now established, that, if particulars are such as the defendant ought to give he cannot refuse to do so merely on the ground that his answer will disclose the names of persons whom he may intend to call as witnesses at the trial." At the same time on an application by the plaintiff for particulars or for further and better particulars the Court before acceding to it must be careful to see that the demand is not of a vexatious or oppressive character or the material facts being pleaded in this statement of defence with sufficient precision to enable the plaintiff to know and to prepare himself to deal with them, that the plaintiff is not correctly endeavouring to get something more to which he is not entitled i. e., the disclosure of evidence in defendant's possession.

JOTTINGS AND CUTTINGS.

Comments on Judges.—It is reported of Mr. Justice *Hutton*, one of the judges who supported the action of John Hampden in the Ship-Money case, that shortly after the trial one Harrison 'a Batchelor of Divinity and Parson,' came into the Court of King's Bench, where the judge was sitting, and said, 'I accuse Mr. Justice *Hutton* of High treason.' He was duly indicted in the King's Bench, fined five thousand pounds to the King, and on a bill of indictment ordered to pay the further sum of ten thousand pounds as damages to the judge himself. That was an extreme instance of the exercise of the Court's power to protect its members from attack, and in more modern times it has been recognised that even the power to commit summarily for contempt ought not to be used for the vindication of the judge as a person; tor comments made upon him which do not interfere with his administration of justice in a pending case 'he must resort to action for libel or criminal information' (per Lord *Morris* in *McLeod* v. *St. Aubyn* [1899]. Mr. Justice *Avory* has somewhat extended the doctrine of a judge's freedom from criticism, even in a pending case, by suggesting that if certain comments which were alleged to have been made about him by counsel engaged in the case to their own client had really been made, he would have ordered a settlement between the parties to be set aside on that ground alone, apart from any question as to the authority of Counsel to effect the settlement (*Hay* v. *Olivier*, November 7). The statement imputed to Counsel by the aggrieved lady client who tried to make it a ground for re-opening the case was that she must agree to a compromise because the learned judge was one who would never listen to anything against an official—the defendant in the case was a former

Governor of Jamaica. But it was just as incredible that any responsible counsel could have used such an argument as it was that the judge himself should have had any such prejudices. Mr. Justice *Avory* preferred, however, to treat the matter seriously, and only dismissed the lady litigant's application after hearing full statements of the actual facts attending the compromise and formal repudiations from the Counsel concerned from their places at the Bar. We doubt whether this was necessary, but we should not like to accept the view that, even if the statements had been made, they would have furnished ground for the re-opening of the case against the other party to the settlement.—1913 *Law Journal p. 654.*

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The Privy Council and the Dominion.—That Imperial maid-of-all-work, the Privy Council, has more than once had to consider whether a tax imposed by a Provincial Legislature in the Dominion of Canada was unconstitutional, as not being direct taxation to raise revenue for provincial purposes, within the meaning of the British North America Act, 1867, S. 92. For the determination of the question when taxation is direct and when indirect, the Judicial Committee has at times turned itself into a School of Political Economy and discussed the theories of the leading authorities on the science. In the result they adopted John Stuart Mill's definition of a direct tax as ' one which is demanded from the very persons who it is intended or desired should pay it,' as distinguished from indirect taxes, which are 'those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.' The law of Quebec has imposed a succession duty as part of the Provincial Revenue, and in *Cotton* v. *The King*, an appeal from the Supreme Court of Canada, the Judicial Committee decided on Monday that the duty was not direct taxation, and that the enactment which imposed it was, therefore, *ultra vires* on the part of the Provincial Government. It seems fairly obvious, indeed, that the persons from whom succession duty is obtained, viz., executors or administrators, are not intended to bear the burden themselves. They indemnify themselves at the expense of the beneficiaries. If the legal point in dispute is not one of much interest, the case in its broader aspect suggests a reflection not unworthy of consideration at the present time. No better tribunal for the determination of a constitutional question can be imagined than the body of distinguished jurists who sit in Downing Street, far removed from the political influences that may prevail or the passions that may have been aroused in the colony where

the question arose. If Lord Haldane's dream of an Imperial Assize were to be realised it would be necessary at least to provide that cases involving constitutional issues should, as heretofore, be heard in the capital of the Empire.—*Ibid p. 655.*

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Contracts 'Implied' in Law and by Inference.—A rather fine distinction is raised in our law between contracts which are 'implied in law' from circumstances independent of agreement and contracts which arise from an inference of fact and only differ from express contracts in the form of proof. They are both called 'implied contracts,' but in the former case the promise implied is a mere fiction of the law created to give effect to obligations arising out of equitable considerations ; in the latter the promise is an implication of fact based on circumstantial evidence, and although the proof is different the legal consequences are the same as in an express contract. A case which brings into sharp relief the nature of the distinction between these two classes of implied contracts has just been decided by the House of Lords in an action in which builders who had erected a picture theatre declined to recognise the claim of a firm who had supplied door furniture for the theatre on the orders of the architect, on the ground that the architect was not their agent, and that the payments which they had received from the building owner, on the architect's certificates, were properly attributable to other items in the contract (*Ramsden & Carr* v. *Chessum* & *Sons*, November 10). The plaintiffs sued as for the price of goods sold and delivered on the orders of the architect, or in the alternative on an implied contract to pay as for money had and received to their use or held in trust for them, and Mr. Justice *Hamilton*, who first tried the case, found that their claim could not be supported on either of these grounds. But he also held that, in the circumstances of the case, the fact that the goods were used by the defendants raised an implied promise to pay for them, and he accordingly gave judgment for the plaintiffs. The Court of Appeal by a majority (Lord Justice *Kennedy* dissenting) reversed this decision, holding that the circumstance that the goods were used by the defendants raised no implied contract in fact, and as there was also no implied contract in law arising from the receipt of instalments from the building owners, the claim altogether failed. In face of this equal division of judicial opinion the House of Lords has now unanimously decided that, in the words of the Lord Chancellor 'if A brings goods to B, to be used upon work which B is doing, and B knows that those goods are not brought as a gift, but are

meant to be paid for, and B then uses the goods upon his works, the inference to be drawn from these facts is that there was an implied promise on the part of B to pay for the goods.' As thus stated the case seems fairly simple and the conclusion obvious. It is arrived at by an implication of fact, and there is no need to invoke the fiction of a contract implied in law to arrive at a result so consistent with natural justice.—*Ibid p. 655.*

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The Court of Criminal Appeal.—Three interesting practice points came before the Court of Criminal Appeal on Monday. The most important was that of *Rex* v. *Young*, the appeal of a prisoner who had been convicted as a 'habitual criminal' and sentenced to the unusually long term of ten years' preventive detention by the Deputy Chairman of London County Sessions. Mr. Lawrie, in summing up, had told the jury that the point for them to consider, there being numerous previous convictions proved, was whether the prisoner when he last came out of prison had made up his mind to lead an honest life. If he had not done so, then they were at liberty to convict him of 'persistently leading a dishonest and criminal life' within the meaning of the Prevention of Crime Act, 1908, S. 10 (2) (*a*). Now, this direction threw upon the prisoner the onus of proving that he was not a habitual criminal. It was defended before the Court of Criminal Appeal on the ground that the proof of three statutory convictions and numerous others prior to prisoner's last conviction was *prima facie* evidence that he was persistently leading a dishonest and criminal life; the burden of rebutting was then shifted upon the prisoner. There are indications in some of the earlier judgments of the Court of Criminal Appeal (see *Rex* v. *Waller*, 3 Cr. App. R. 213; *Rex* v. *Kelley*, 3 Cr. App. R. 248; *Rex* v. *Everitt*, 6 Cr. App. R. 267), that this view at one time seemed likely to commend itself to the Court; but all such *obiter dicta* have been overruled by the strong pronouncement on the point made by the present Lord Chief Justice a fortnight ago in *Rex* v. *Brown*) 'The onus of proof' he said, 'in that case has been imposed by the Legislature on the prosecution and must be strictly complied with in every case.' Again, the phrase 'is persistently leading,' he pointed out, shows that evidence of a guilty life cannot be inferred merely from continuous conduct in the past; there must be new evidence of dishonest ways covering the period just prior to the latest offence, that to which the second count is appended. Mr. Lawrie's direction clearly infringed those principles which the Lord Chief Justice once more emphatically re-affirmed as essential and therefore the conviction was quashed.

A question as to sufficiency of evidence was raised in *Rex* v. *Frederick Albert Robertson* (November 11). The prisoner had been convicted at the Central Criminal Court of murdering his three children. In June last the prisoner's wife was taken ill and removed to the infirmary. The prisoner tried in vain to get his children looked after during her illness by a hired person, by the relieving officer, and by the Salvation Army. Then they disappeared and were never seen again. On July 25 bodies in so advanced a state of putrefaction that they could not be identified were found buried in a cellar under the appellant's house; but the medical evidence pointed to death by suffocation. The prisoner had accounted for the disappearance of his children by a series of stories which were pure invention. It was contended for the prisoner that some overt act on the part of the prisoner pointing to murder by him must be proved in order to convict. The Court, however held that such overt act is not necessary: the purely circumstantial evidence was enough to justify the jury's verdict.

The third case (*Rex* v. *Samuel Booker*) raised the point how the Court ought to treat an appeal against a sentence where the prisoner desired an increased sentence. The facts were quite peculiar. The appellant, convicted at Northumberland Sessions on charges of larceny and burglary, had been sentenced to 12 months' hard labour. In prison he became converted and desired to reform but feared that his good resolutions would give way under renewed temptation if he were released before the habit of steady work had become confirmed. He therefore asked for a sentence of penal servitude. The Court, however, held that the severity of a sentence is a matter of public policy, and that the wishes of the prisoner cannot be considered by the Court of Criminal Appeal. The only question for it is whether the sentence was a proper one. There being nothing improper in the present sentence, the appeal was dismissed.—*Ibid* p. 650.

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BENCH AND BAR AT THE GUILDHALL.

THE LORD CHIEF JUSTICE'S SPEECH.

The Lord Chief Justiee, responding on behalf of the Bench to the toast of 'The Judges and the Bar of England' at the Guildhall banquet, said:—You will, I am sure, forgive me if, before I say a word on behalf of my brother judges, I give utterance to two thoughts which are foremost in my mind at this moment, when I stand here, in this historic hall of the ancient City, and address you in response to the toast so felicitously proposed. The first is that

I count it indeed fortunate, and, may I say, appropriate, that my first public utterance outside the Courts of Justice should be made here in the City—bound as I am to the City by memories of my early youth, my early association and training; and remembering, as I do, that much of what has stood me in good stead in my life in later years was learnt in the City and amongst business men. The second is, you may perhaps think, a little more irrelevant, but I am in my infancy as a judge, and, therefore, you must forgive me if I stray a little into irrelevancy. I cannot address you here to-night in the City without recalling that I should not be here, occupying this position at this moment, if it were not for the great struggles of the City—now so many years ago—in the cause of the religious liberty. I should be ungrateful indeed if I allowed this opportunity to pass without reminding you that, first of all, it was the City that insisted upon members of my community being members of your Corporation. And it was the City that led the struggle for representation, again, by members of my community in the House of Commons. If I have strayed for a moment into those paths which, perhaps, are not peculiarly appropriate for the toast to which I am responding, it is because I should think that I were false to everything that is within me if I did not give utterance to these sentiments, remembering as I do that memories so quickly fade, and that, where a whole nation now agrees that there should be the fullest religious liberty and toleration, that was not the case when the City fought the battle which placed me here. I am privileged to speak for the judges. I know them from my observation at the Bar more than in my association with them as judges. I know them from practising before them for so long, and it is, perhaps, for that reason that I may respond for them with less restraint, as I am accustomed, or have hitherto been accustomed, to take my place at the Bar, where there was greater freedom of expression, where impartiality was not a virtue, and silence was not golden. Now, in the very fact of which I am an illustration, at the Bar yesterday, on the Bench to-day; at the moment fighting with or against opponents at the Bar, who never become enemies but only opponents, and the next either addressing them or being addressed on the Bench; where we know all their qualities; where, when I was at the Bar I used to say I knew their defects, and where, now I am on the Bench, though I am sure I shall not hear it, I know there will be many at the Bar who know my defects. In responding for the judges, I am privileged to say, from the little that I have yet seen, that it is indeed an honour to associate with them in the dispensation of justice. My predecessor, Viscount Alverstone, to whom

so eloquent a tribute was paid recently by the Lord Chancellor and the Attorney-General, was a man who devoted, not only the best of his abilities, but the best of his strength, to furthering the cause of justice. He never spared himself, he never learned the meaning of economising his forces. Although I would not for one moment presume to add anything and could not add anything, to what was so well said on a recent occasion, I may be permitted to say—coming straight as I do to-day from the Court of Criminal Appeal, over which he presided in the early days, and in which he did such excellent work, and in which he was so well and ably assisted by his brother judges—that I am quite sure that this Court, which in my humble judgment does such excellent work, was one to which Lord Alverstone devoted the best of his abilities and energies. Whatever his views may have been as to the necessity for the Court, from the moment that the Act of Parliament was passed, he laboured unwearyingly and unremittingly to make it a success, and to make it a Court to which everyone would come with the absolute conviction and certainly that, as far as it was possible with reference to any human being, justice would be administered there with one single purpose, namely, that of doing right. I might be tempted to indulge in some speculation as to what the result of the Royal Commission which His Majesty appointed to inquire into the causes of delay in the King's Bench Division, but I shall not attempt to do so. I am quite certain that that Commission will have laboured to produce recommendations which we shall consider with the utmost respect—recommendations and views which I know that my brother judges will attempt, not only to consider, but to give effect to if possible—and that the only view which they would put forward at this moment is that the judges of England are animated by one single purpose—to serve the highest public interests of the State, and to do what in them lies to promote the course of justice, and in that way to do good and satisfy the public demands of the community. I know very well it is easy to criticise judges, but it should always be remembered that it is the function of the judges who preside in the Law Courts to interpret the laws and administer them, and that they must leave the function of making the laws to Parliament, which is responsible. Perfection can never be attained by human beings, but we can labour, as I believe we have laboured, and as I am sure judges will labour in the future, to make justice swift, and yet not hurried—for justice in haste, is, in my opinion, justice in jeopardy. Above all, whilst administering justice and passing judgment upon actions of men we shall always remember that justice is never less in peril than when it is tempered by mercy.

The Attorney-General, in responding to the toast on behalf of the Bar, said that the profession for which he spoke was, of all professions, the most constantly misunderstood. There were still some deluded persons who regarded a barrister as one who learned his living by fomenting strife and who took peculiar pleasure in bamboozling juries and misleading judges by the exercise of acumen almost diabolic, stimulated by the payment of fees entirely extortionate. In every particular that picture was untrue. So far from strife being promoted by the practice of advocacy, more quarrels were settled, more controversies were closed, and more reconciliations were effected within the boundaries of the Temple and of Lincoln's Inn than in the whole of the United Kingdom besides. This country had evolved a system by which judges, who were themselves trained at the Bar, expected to receive from the advocates who practised before them the contentions appropriate to the case presented with fidelity to their clients, with fairness to their adversaries, and with candour to the tribunal itself. That was why barristers claimed, in some measure, themselves to be the instruments of justice. That was why, by the ancient tradition of that banquet, the Bench and the Bar were coupled in a single toast. That was why he was so proud to respond for that great profession, and doubly proud on an occasion when he shared the responsibility of replying with one who was for three years his colleague and his chief, and whom to-day the whole Bar of England acclaimed as the chief of the permanent Judiciary of the land,—*Ibid* p. 661.

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The Bar and the Empire.—While the number of admissions to the solicitors' branch of the profession shows a tendency to decline —the Council of the Law Society pointed out in their latest report that the number of admissions in 1912 was sixty-three fewer than in 1902—the number of calls to the Bar is increasing. This term 119 students have been called—35 at the Middle Temple, 33 at the Inner Temple, 27 at Lincoln's Inn, and 24 at Gray's Inn. This growth in the membership of the Bar does not mean an increase in the competition in our Courts. It is attributable to the larger number of students who come to the Inns from the King's dominions beyond the seas. More than one-third of the newly-called barristers bear names that unmistakably indicate that they belong to other climes than ours. The Inns of Court, like the Judicial Committee, may thus be regarded as a link of Empire, and any action by which the link is weakened will be a misfortune both from the Imperial and professional point of view. If any of the students

who come from remote parts of the Empire to qualify for the Bar desire to remain here after they are called, no obstacle ought to be placed in their way of pursuing the profession to which they have been admitted. A little time ago a Circuit mess declined to elect an Indian gentleman merely because of his complexion. Such a discrimination if generally maintained—and we are glad to say that it has not been—would be wholly unworthy of the traditions of the Bar, and might prove to be seriously prejudicial to the interests of the Empire.—*Ibid* p. 666.

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Literature and Lawyers.—Lawyers, it may freely be admitted have fared rather badly at the hands of literary men. Even Dickens, who is supposed to have had a liking for the legal profession, did not draw very likable lawyers. But it is not difficult to exaggerate the abuse which some literary men, especially writ-harried poets, have heaped upon all legal heads, and Mr. Leslie Scott, K. C. M.P., who at the annual dinner of the Solicitors' Managing Clerks' Association challenged anyone to produce from English literature a quotation laudatory of the lawyer, did not escape the temptation to take too gloomy a view of the relations of literature and law. A quotation from Crabbe, who wrote at a time when lawyers were generally held in far less regard than they are at the present time, is a sufficient answer to Mr. Leslie Scott's challenge. While ' Pope in worsted ' drew Swallow, whose office he compared to a spider's web in which the ' hard, bad man ' peered about for ' fat, intruding flies' he made amends by drawing another attorney in these sympathetic lines :—

Yet, I repeat, there are who nobly strive,
To keep the sense of moral worth alive ;
Men who would starve ere meanly deign to live
On what deception and chican'ry give ;
And these at length succeed ; they have their strife,
Their apprehensions, stops, and rubs in life ;
But honour, application, care and skill
Shall bend opposing fortune to their will.
Of such is Archer, he who keeps in awe
Contending parties by his threats of law ;
He, roughly honest, has been long a guide
In Borough business, on the conquering side,
And seen so much of both sides, and so long,
He thinks the bias of men's minds goes wrong:
Thus, though he's friendly, he is still severe,
Surely though kind, suspiciously sincere.
So much he's seen of baseness in the mind,
That, while a friend of man, he scorns mankind.

Laudatory lines from more recent writers might be given, but this admirable sketch of an old attorney will suffice. Mr. Leslie Scott who forgot George Crabbe when he made his challenge, may be comforted to learn that lawyers have not been painted quite so black in literature as he supposed them to have been.—*Ibid* p. 667.

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The Crime of Blasphemy.—Attention was drawn by Mr. Justice Coleridge to a curious *lacuna* in our law of blasphemy in *Rex* v. *Stewart* (November 17). The offence is one both at Common Law and under a statue but in neither case does it appear to be any crime to attack a religion other than the Christian, no matter how gross and indecent the attack. The Common Law offence is committed by anyone who either (a) denies the existence of God, or (b) denies the truth of Christianity (1 Hawkins' Pleas of the Crown c. 5); it is a Common Law misdemeanour, and, like all such misdemeanours, not punishable with hard labour. The statutory offence, under 9 William III., c. 35, makes it an offenee for any person who has been educated in, or at any time has professed, Christianity to deny the truth of the Christian religion or the Divine authority of both Old and New Testament; he is declared incapable of holding any civil or military office after conviction, and upon a second conviction debarred altogether from bringing any action or acting as an executor or administrator, offices formerly held under the authority of the ecclesiastical courts. While it is proper that ribald or indecent attacks on the Christian or any other religion, since they tend to promote a breach of the peace, should be restrained by punishment, the law upon the point seems rather out of date and requires amendment.—*Ibid* p. 669.

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Lord Haldane and the Privy Council.—Any misgivings that may have been felt about Lord Haldane's adumbration of a scheme for what was called an 'Imperial Assize' are, happily, removed by the authorized explanation of his remarks given by the Rhodes lecturer at University College last Tuesday. It is now clear that no such thing as an Imperial Assize was ever intended; it was never seriously contemplated that the Judicial Committee should go on circuit throughout the Dominions. That would have been a totally impracticable proposal, and the Lord Chancellor is not given to the putting forward of schemes of impracticability. 'What he does propose, as we are now explicitly assured, is that in cases of great and exceptional importance where the circumstances are such as to give a sitting in a particular Dominion a peculiar value, judges should be

selected from the enlarged panel of the Committee to go and sit there. Nothing better than this could be desired. It gives reality to the functions of the Privy Council as an Imperially consultative and judicial body, and it satisfies at the same time the legitimate demand of the self-governing Dominions that appeals on matters involving a consideration of local conditions shall not be decided, as it were, *in vacuo*, but with some regard to the special circumstances which every judicial tribunal—and especially such a body as the Judicial Committee—must take into account if it wishes to preserve its authority as the dispenser of something more useful than abstract justice. No one would deny that in cases of boundary disputes, or in such a matter as was decided only this week in the claim of Provinces of a Dominion to grant exclusive rights to fish in territorial waters, the Power of the Judicial Committee to hold a special sitting on the spot would add immeasurably to the weight of the decision and the influence of the Imperial tribunal. And although that is a long way from the acceptance of the new canon which some have claimed to set up for the self-governing Dominions—that their Supreme Courts of Appeal shall not be outside themselves—it goes far towards a recognition of their claim to be treated on an equal footing with all other parts of the Empire in judicial as in other affairs. Lord Haldane's suggestions, tentative as they were, contained the seed of a great idea and, as now explained, they may be said even to ingeminate a greater union.—*Ibid* p. 697.

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The Executive and the Law.—One of the many wise thoughts which Lord Morley puts in aphoristic form in his newly-published 'Notes on Politics and History' is the following:

Weakened confidence in our Parliament would be formidable, but confidence destroyed in courts of Justice would be taking out the linch-pin.

The recent tendency of the Executive to encroach upon the province of the Judiciary is, unfortunately, calculated to loosen the 'linch-pin.' While the Government, of which Lord Morley is so distinguished a member is constantly seeking to confer upon Departments the functions that properly belong to the Bench, the public, or rather such part of it as Ministerial schemes are intended to appeal to, can hardly be expected to retain that confidence in the Courts to which Lord Morley rightly attaches so much importance. Fortunately, however, the jurisdiction of the Courts is not easily to be ousted. As the President of the Liverpool Law Society points

out, in the address reported in another column, six cases have recently been heard in the Courts in which, after the jurisdiction of the judges had been unsuccessfully challenged by the Crown, Orders or Requisitions made by various Departments of the State have been held to be illegal. The proposals for the reform of the land laws which are now being put before the country indicate, unfortunately, that the mischievous tendency is not declining.—*Ibid* p. 698.

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Annual Address of the Liverpool Law Society.—"Last year my predecessor (Mr. Norris) drew attention to the growing danger to the liberties of the public from the rapid increase in this country of officialism and from the usurpation by the Executive of the functions of the Judiciary. I entirely concur in the views which he then expressed. In regard to officialism, I will only say that the situation to-day is even more serious than it was a year ago; for, if the past twelve months have not witnessed the creation of a large number of new officials, there are proposals now being placed before the country which if adopted by Parliament, will greatly extend, and in some instances in entirely new directions, the sphere of officialism. But, important as this question of officialism undoubtedly is—and I, for one, have no desire to minimise its importance in any way—it is in my opinion less fraught with danger to the public welfare than the assumption by the Executive of judicial powers. For some years past it has been a common practice on the part of the Legislature to empower a Department of State or a public official to make and issue Rules, having the force of Statutes, regulating and even extending the application of the Act to which the Rules relate. Furthermore, in more recent times there has been an increasing tendency to confer on a Department of State or some especially constituted body full authority to determine, without appeal or any resource to the courts, questions arising under a particular enactment. As illustrating this modern practice on the part of the Legislature, I may point out that during last Session two bills were introduced into the House of Commons, one a Government measure and the other a private member's bill, in both of which the same mischief appeared. The first bill referred to was the Revenue Bill, which in clause 10 provided that any decision of the Commissioners under that clause was to be final and not subject to any appeal. The other bill was one to amend the Public Trustee Act, 1906. That bill provided that where the Public Trustee was satisfied that it was the desire of the beneficiaries that he should become the sole trustee of a trust, he might, by writing, signed and

sealed by him, declare his acceptance of the trust, and thereupon he was to become sole trustee to the exclusion of any other person. It was further provided that the Public Trustee was to be authorised to accept as sufficient evidence a statutory declaration of any person appearing to have personal knowlege of the facts. Fortunately, so far as my present point is concerned, neither bill reached a third reading. If evidence were needed as to the unfitness of Departments of State to determine questions involving the consideration of points of law, I would remind you that the courts have been called upon to determine the validity of orders or requisitions made by various Government Departments. And in no less than six reported decisions affecting such different public offices as the Charity Commissioners, the Board of Education, the Board of Inland Revenue and the Local Government Board the orders of requisitions in question were held to be illegal. It is significant also to observe that in all the six cases the jurisdiction of the court was strenuously resisted by the Department concerned. I cannot believe that there is any desire on the part of the public to substitute for a trial in one of his Majesty's courts a decision of a tribunal composed of some person or persons in the employment of the State no doubt, but unknown and invisible to the parties, whose decision, unsupported by reasons and arrived at without hearing argument on either side, is communicated to the parties, without any disclosure of the evidence or information upon which it is based, and which may wholly or in part have been obtained by the tribunal behind their backs. Even such essential characteristics of a judicial inquiry as impartiality and independence on the part of the tribunal are likely to be absent, for in most instances the persons appointed to adjudicate will be officials, whose duty it is to assist in the administration of the Act of Parliament under which the proceedings have been instituted. Such a procedure, adopted by the Local Government Board in one of the cases to which I have referred, was a few weeks ago pronounced by two members of the Court of Appeal to be contrary to natural justice. In my opinion the increase of the bureaucratic element in the Government of this country threatens to become so serious a menace to the liberty of the subject that it behoves all who are interested in the nation's welfare to take every means in their power to warn the public of the impending danger ; *Ibid* p. 705.

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The Judicial Committee.—Professor J. H. Morgan, in his concluding Rhodes lecture at University College, Gower Street, on Tuesday night, gave an authorised explanation of Lord Haldane's remarks (reported in the Law Journal of November 8) when presiding at the first lecture. Professor Morgan said :—'In concluding this course of lectures I should like to say that I am authorised by the Lord Chancellor to make a statement about the suggestions thrown out by him when presiding at my first lecture as to the future development of the Judicial Committee. They were, as you will remember, the Lord Chancellor was careful to insist, merely suggestions. They have naturally attracted great attention, and they have excited, as perhaps they were meant to excite, some criticism. Generally they have been warmly welcomed as containing the germ of a great idea, but in one or two quarters they have been misunderstood. They did not propose that the Judicial Committee should go on circuit throughout the Dominions. No one who was actually present on the occasion of Lord Haldane's speech could have imagined that they did. What they did propose was that in cases of great and exceptional importance, where the circumstances were such as to give a sitting in a particular Dominion a particular value, a number of Judges should be selected from the enlarged panel to go and sit there. It should be remembered, as anyone who looks at the Statutes of 1833 and 1844 may discover for himself, that the Judicial Committee is a body possessing, as an Appellate Tribunal, exceptional powers of directing the examination of witnesses on oath and of directing inquiries into issues of fact in particular cases, and one can well conceive that there might be cases in which such inquiries were best held in the Dominion itself. The Committee has already begun to group appeals from a particular Dominion so as to facilitate their hearing during a particular period —a practice which has enabled the Law Officers and the Chief Justice of Canada to be present when Canadian cases are heard. From this it is but a step to provide for an occasional sitting in Canada itself.'—*Ibid* p. 706.

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The Late r. Justice P R Sundara Aiyar.

REFERENCE IN THE MADRAS HIGH COURT.

On Monday the 22nd December, 1913. all the Judges of the High Court except the Chief Justice who was absent from Madras being assembled in the second court.

The Advocate-General addressed their Lordships as follows :—

I rise my lords under stress of considerable emotion to condole with Your Lordships upon the loss which you, in common with ourselves, have suffered by the death of the late lamented Judge whose loss we deplore. My Lords I feel considerable diffidence in addressing you because I see around me many far better able to do so than I am. Though my acquaintance with the learned Judge dates back only from October last year, still it was my privilege on several occasions during his last illness to visit him and to have long talks with him which gave me an insight into his character which would have been denied to me if I had known him only as a Judge. My Lords, the learned Judge had a very distinguished career at the Christian College where he carried off the Gold medals in several subjects and he passed first in the whole Presidency in the examination for the degree of Bachelor of Laws. That my Lords, merely indicated the extraordinary character of his industry through life. This was the outstanding characteristic of the learned Judge in that he was devoted entirely to his work and that he thought of very little else than his duty. As a lawyer whether at the Bar or on the Bench, it is not for me to speak. I would only say this, that it was characterised by a careful preparation and by rapidity-rapidity which was sometimes not liked by Counsel, but which nevertheless made for the quick discharge of business. Of his keenness with regard to the profession there is a good deal to be said, because he alone of all the Judges and for the first time in the history of this Presidency, took the trouble to prepare lectures for the benefit of apprentices to whom he lectured under Your Lordship's auspices on the Ethics and Etiquette of the Profession. If I may venture to touch upon another aspect of his character I would say that it was signalised by his faithfulness to his friendships, by his never failing kindness to those he had known early in life and by his goodness to his former pupils. Of his piety it is not for me to speak but of that he has given ample proof. In Education he was keenly interested and his interest took not only the ordinary form of subscriptions and so on but also the more troublesome form of assisting numbers of students. The learned Judge was fortunate early in life in being associated with such distinguished men as the late Mr. V. Krishnaswamy Aiyar and the Hon'ble Mr. P. S. Sivaswamy Aiyar with whom indeed he began his career at the Bar. He was a pupil of Sir S. Subramania Aiyar. But there is this to be remembered about him that his success was not due to his early friendships, but to his own efforts. He was entirely the architect of his own fortunes. My Lords, we all feel, I speak on behalf of every branch of the legal profession of this Presidency, that Your Lordships in common with ourselves have suffered a great loss

by the death of Mr. Justice Sundara Aiyar. We desire to place on record our sincere condolence and the expression of our profound regret. My Lords, Mr. R Shadagopachariar, a friend of the learned Judge desires permission to address your Lordships when I have concluded.

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MR. R. SHADAGOPACHARY.

Mr. R. Sadagopachary on behalf of the Vakils, then addressed their Lordships as follows:—My Lords, It is my melancholy and sad duty to announce to your Lordships, the sad and premature death, of Mr. Justice Sundara Aiyar. We all hoped that the learned Judge would soon recover, and would resume his useful work on the Bench. Nobody ever dreamt that death was so near, and would snatch away that brilliant gentleman. My Lords, within the last five or six years, we had to mourn the loss of such leaders as Raja T. Rama Rao, Mr. P. Ananda Charlu, Mr. Ramachandra Rao Sahib, and Sir V. Bhashyam Iyengar, and only the year before last we lost another esteemed Judge, Mr. V. Krishnaswamy Aiyar. Our tears have not yet dried, before this calamity again happened. As one of the oldest Vakils of this Court I had the rare privilege of knowing the late Judge, Mr. Justice Sundara Aiyar, very intimately. His scholastic and university career gave promise of the future man, and subsequent events proved that he was a brilliant lawyer, and splendid Judge. He commenced practice in 1887, and soon after that his merits for able advocacy attracted the attention of that great Judge Sir Subramania Aiyar, who helped him on, so that his progress was considerably accelerated by the liberal assistance, which was rendered by him and it was not very difficult for him, after the elevation of Sir Subramania Aiyar to the Bench, to step into the shoes of his patron, friend and admirer. And as a vakil of this Hon'ble Court his success was unique in the annals of this Hon'ble Court. There are no cases of importance, in which he did not figure. The Indian Law Reports, in some of which his arguments are recorded are a cogent testimony to the brilliancy of his intellect and to the quick grasp of the fundamental principles of jurisprudence. His courtesy to the bar was inimitable. And it was not all. His activity was varied. He was the Editor of the Madras Law Journal, and the learned Leaders and the critical notes which were to be found from time to time go to show his quick grasp of the principles of law. He was also connected with the Vakils' Association, and he tried his very best to enhance its utility and to put it on a very satisfactory footing. This shows again his love for

his brethren in his profession. His lectures on Professional Ethics as the learned Advocate General pointed out, go to show what a high ideal he wanted to place before himself both as a lawyer and also as a Judge. They also show the audience of his desire to infuse those ideals into the young and the budding minds of the would-be-vakils. My Lords, it is not only as a Judge and as a lawyer we deplore his loss ; apart from these two, he was taking a prominent interest during his career as a Vakil in all matters public, and he contributed not a little to the formation of healthy and sound views on the burning topics of the day. Nature which was so prodigal so far as the learned Judge was concerned in regard to all her gifts of rare qualities, which marked him as a great man was niggardly with regard to the longevity of his life. It is not as it ought to be. The late Judge took advantage of every possible opportunity to do good to his fellow creatures. As to his achievement as a Judge, your Lordships know it much better than I do. It is no exaggeration to say that so far as judicial acumen, strict integrity, stern impartiality, quick grasp of facts and sobriety of judgment were concerned, he was second to none. The Indian Law Reports which contain some of his decisions bear testimony to his unquenchable thirst for knowledge, his indefatigable search for authority and firm grasp of the principles of law. I venture to say that his death is a national calamity. The High Court lost one of its brightest gems, the society lost one of its healthy advisers, the country lost a very valuable asset, and last of all, but not the least, the Crown lost a painstaking conscientious and loyal public servant. It is a great pity that he did not enjoy a longer lease of life in order that he might exert the whole of his faculties when they were becoming ripe and beginning to unfold many of the blossoms. It is a great pity that he was not in a position to still more embellish the Indian Law Reports, because the cruel hand of death snatched him away. A bright and great man has passed away from us. He was a religious, pious and God-fearing citizen. The only duty that remains for me to do is to convey the condolence of all the Vakils to the bereaved family.

MR. JUSTICE WALLIS.

The Hon'ble Sir John Wallis on behalf of the Bench replied as follows :—Mr. Advocate General and Mr. Sadagopachariar, I have in the fist place to express my regret that his Lordship the Chief Justice is unavoidably prevented from being present to-day to give a fitting expression to our feelings on the melancholy occasion. He has telegraphed asking me to say that he is with us in our expression

of the loss which we have sustained. On behalf of my colleagues and myself I desire to say that we most fully agree in all that has so worthily been spoken by the Advocate General and by Mr. Sadagopachriar in recognition of the great qualities of the colleague whom we have now to mourn and who has been prematurely snatched away by an untimely fate. As has been observed, the late Judge started life with fewer advantages than most of his contemporaries. After a brilliant scholastic career, philosophy, I believe had first claimed him, he soon devoted himself to law and having had the good fortune to obtain his instruction in that field from Sir S. Subramania Aiyar, he rapidly came to the front. Some of us whose memories go back a few years, may think that perhaps he reached the zenith of his career a few years before his first illness. Then he had a commanding position at the Bar and displayed in a degree surpassed by none, the qualities of great advocacy—directness and force, the power of brushing aside details and getting to the heart of a question. In these qualities, if I may venture to a personal appreciation, he was surpassed by none of his contemporaries. But the strain which he put upon himself was too great even for his powerful personality. It may be remembered he was laid up for a year or two. We also remember the ease with which he resumed his position at the Bar when he came back and with what universal satisfaction his appointment to succeed his life-long friend Mr. Krishnaswamy Aiyar was welcomed. With regard to his work as a Judge I feel sure that my colleagues as I do myself, agree with all that has so eloquently been spoken by Mr. Sadagopachariar. There can be little doubt of the permanent value of the contribution which he was permitted to make in the brief time at his disposal which I think was under two years. If I may say so, the very elaboration and the desire to exhaust the subject which characterise some of his Judgments, while due no doubt to the thoroughness of the man, may also perhaps have been to some degree due to the feeling that his time was possibly short. I need say little after what has been already said as to the interest which he continued to take in the profession after his elevation to the Bench and the alacrity with which he accepted the duty to deliver the first course of lectures on professional conduct and advocacy and of the satisfactory manner in which he discharged that task for two consecutive years. I was also glad to hear the learned Advocate General's allusion to the interest which he always took in his pupils whom he had trained and the pleasure which any appreciation of their work always gave him. As Mr. Sadagopachariar has said the late Mr. Justice Sundara Aiyar was not only a lawyer but was also a public spirited citizen.

I am not saying too much that in that capacity he earned a great reputation as a wise and courageous man. There is just one field of his activities to which I may be permitted to refer. For three years he was my colleague on the Syndicate of the University. In the few months during which we have been deprived of his society owing to illness we have deeply felt his loss both on the Syndicate and the Senate. It is a loss which it will indeed be difficult to replace. As characteristic of the man I may mention that on the last occasion when I had the pleasure of seeing him when his illness had momentarily taken a turn for the better, he asked that the Syndicate boxes should be continued to be sent to him and *added*—something stiff. No man is of course indispensable. But by the death of Mr. Justice Sundara Aiyar, both the profession and the public in this Presidency have sustained a loss which it will indeed be difficult to replace.' As a mark of respect to his memory, the Court will adjourn for the rest of the day.

CONTEMPORARY LEGAL LITERATURE.

In the *Harvard Law Review* for November, Mr. Willinston questions the correctness of the decision of the House of Lords in the recent case of *Heilbut* v. *Buckleton*[1]. That was a suit for a breach of warranty. Plaintiff inquired of the defendant whether his firm was bringing out a new Rubber Company. Defendant replied they were. The plaintiff then asked whether the company was all right; the defendant answered that his firm was bringing it out and the plaintiff said that that was good enough for him. Plaintiff was induced by this conversation to purchase shares of the new company which proved a failure. It turned out that the company was doing not only rubber business but many other kinds of business. The Court of Appeal held that on these facts the defendant must be taken to have warranted the truth of the statement that the company was a rubber company. The House of Lords on the other hand emphatically held that there was but a representation in the case and in the absence of anything to indicate that there was an intention to contract, the animus contrahendi, defendant was not liable. Mr. Willinston says that this decision is wrong. He thinks that the principle acted upon in the case of sale of goods that a representation of fact, (not being mere opinion) with respect to the subject matter of the sale amounts to warranty should have been applied to this case as well, and the opinion of the Court of Appeal should have been upheld.

1. (1913) Ap. Cases 30,

In the October number of the *Canadian Law Times*,Mr. Sherman discusses the indebtedness of modern jurisprudence to the Mediaeval Italian Law. Italy revived the Roman Law for Western Europe by the exertions of its glossators. Her University of Bologna where Roman Law was assiduously taught served as a model to the other Universities that came to be established. Through the labours of the Lombard Vacarius, began the Mediaeval reception of Roman Law in England. To the Italian Placentinus is due the founding of the first French Law School at Marthellier, in Southern France. Thus was introduced into France the study of law and the system of glossators. The thirteenth century English Chief justiciar of Henry I. Bracton, the father of English Common Law used freely and often copied word for word the work of Azo, the Bologna Professor of Law. The son of Accussing a disciple of Azo, gave lectures on Law at the Oxford University in1275-76 during the reign of Edward I. Roman Law was also revived in the Mediaeval commercial compilations of Maritime law which originated in Italy. Ensolato Del Mare, one of those compilations dealing with maritime law is one of the earliest sources of modern law as to international trade relations. Though Canon Law never became the secular law of Europe, it had immense influence over the latter. The celebrated *commentators* of Italy, Bartolus especially,served to make a common European jurisprudence. His commentaries on Roman Law received at one time statutory authority in Spain and Portugal. In France, the opinions of Bartolus were so influential in Courts of Justice that their weight gave rise to proverbial expressions "*plus resolu que Bartole*" "*resolu consure un Bartole.*" He is to be regarded as the creator of the common law of Germany which sprang from the reception of Roman Law in the German States.

In the same issue of the Journal, Mr. Henry Happold gives an account of Betrothals and Marriages in Germany. In Germany, there is no breach of promise of marriage action as in England. In case either party refuses to enter into the marriage, then he or she has to pay to the other and their respective parents or such persons as have stood in the place of parents, such damages as they have sustained by reason of having in expectation of the marriage incurred expense. Conpensation need not be paid, if there was good reason for either party not marrying the other. A woman who is of blameless character and has permitted the man to whom she is betrothed to have carnal knowledge of her can, if the man withdraws, claim monetary damages. In case no marriage takes place presents have to be return-

ed. There are rules as to consent of parents, of adoptive parents, and of the guardianship court in the case of persons below a certain age. A person who has adopted another cannot marry the person adopted; if marriage takes place, adoption comes to an end. A woman cannot remarry for ten months after the dissolution of marriage. Ordinarily six months' publication is necessary before a marriage takes place but it may be dispensed with where one of the betrothed is too ill and the ceremony cannot be postponed. The marriage in every case is a civil one but the parties, if they so desire, can have it followed by a religious ceremony.

Mr. George H. Paremele contributes the third of the series dealing with the evolution of Modern Law Books under the heading "Annotation Problem." He rightly points out that mere grouping or massing of cases under broad statements of principles and rules without specific applications, contradictions, limitations and distinctions however attractive to the merely academic reader is of little value for the practitioner and the Judge.

Sometime back, we noticed an article of Mr. Beale in the *Harward Law Review* on the jurisdiction of courts over foreigners. In an article contributed to the December number of that Magazine, he discusses the power of courts to compel an absent foreigner, through jurisdiction over property belonging to him, to discharge his obligations. The typical example of jurisdiction in rem is the jurisdiction of the court of Admiralty over any vessel within the territorial waters of its sovereign. Other instances are suits relating to land and chattels, within court's jurisdiction. Though no personal decree can be passed against the foreigner, the court can enforce the lien against the land or chattel. In the case of chattels, the condition of jurisdiction is the existence of the chattel within the court's jurisdiction. It is not quite settled whether mercantile paper is a chattel within the meaning of the rule. The mercantile view seems to be that it is. An extreme mode of the exercise of jurisdiction is by what is called the foreign attachment or garnishee proceedings. It had its origin from the custom of London. Under that procedure an action is maintainable against a person resident within the jurisdiction of the court from whom a debt is payable to the foreign debtor for its recovery and application of the amount in discharge of the debt due to the plaintiff. The writer traces the history of this form of action, and how the original nature of the action as a composite or double action against the debtor and the debtor's creditor has been forgotten and how as a result the only test of at present applied for the court's jurisdiction is the garnishee's presence within the court's jurisdiction. The

French mode of dealing with the question is to bring an action against the garnishee in the court in which he can be sued for injunction not to pay the debt over to the debtor pending an action by the plaintiff against the principal debtor in the court to which the latter is subject. What is the situs of debt is one of the subsidiary questions dealt with in the paper.

If money to which person is legally or equitably entitled is wrongfully mingled by another with his own monies, so that the whole forms an indistinguishable mass it was at one time held that all right to follow it is lost because it can no longer be identified. It was said that money had no ear-mark. This view no longer holds. According to the present view the person wronged has an option, in addition to a personal claim against the wrong-doer between a charge on the whole mass for the amount contributed by him and ownership in equity of a proportionate part of the whole. Mr. Austin W. Scott discusses the application of the modern rule under varying conditions. The several circumstances considered by him are (i) suppose a man deposits a certain amount consisting partly of his own money and partly of another's and then withdraws leaving some amount; (ii) suppose subsequently he invests the amount withdrawn but squanders the amount left with the bank; (iii) suppose again after once withdrawing he makes additions to his original deposit; what are the rights of the person wronged under these various conditions. The answer given by him is that the person wronged has not only the right to proceed against the amount remaining but he is equally entitled to proceed against the amount withdrawn if it is traceable. Ordinarily speaking in the absence of special circumstances he is not entitled to fresh additions made. His right is restricted to the lowest balance after the original deposit. The special circumstances under which he would be entitled to the additions are where, for instance, there is indication that the additions are made from a desire to make a reparation or even if there is no such desire, where the original deposit was on a trust account and deposits are made in that account after a wrongful withdrawal.

Another writer Mr. Edward P. Robers puts in a vigorous plea for the courts giving relief in cases of what he calls *predatory price cutting*. It consists in underselling known articles with a view to attract customers to be able to sell them other goods, which invariably results in the loss of trade for the owner of the articles. He shows how the original idea that only trade marks were protected, has given way to "passing off" actions as they are called in England

or actions against "unfair competition" as they are called in America, how there has been progress by protecting against unfair use of even geographical names with a view to mislead people as to the origin of articles and how it is only necessary that this particular form of unfair trading ought to be restrained. The Tribunal of Commerce in Brussels seems to have held certain phases of price-cutting to amount to unfair trading. A Danish statute expressly prohibits it.

In the *Michigan Law Review for November*, Mr. J. W. Bingham discusses the nature of legal rights and duties. This comes as a supplement to his discussion as to "What is the Law" which we have already noticed. According to him when we speak of a legal right we assert the potentiality of certain legal consequences in a given set of circumstances. In this view, legal remedies are not the result of legal rights; on the other hand, potentiality of legal remedies is of the essence of legal rights. The second thing that he says is that the division of legal rights and duties into primary or substantive, and secondary or remedial is only a classification of conditions, conduct and events in their aspect of barriers to condemnatory legal consequences. He thinks that it is an error to say that legal rights and legal duties are correlative; on the other hand, he says that they are both one. While speaking of one thing, you lay stress on one aspect of the case; while speaking of the other, you lay stress on the other aspect. He has many interesting observations to make about other legal terms e.g., legal right of action, rights in personam, and rights in rem. Mr. Charles Sherman in an article contributed to the same Review for December, considers the "Debt of the Modern Law of Guardianship to Roman Law". In insisting upon security being given, in the guardians' liability for fraud and neglect etc., in the duty to take a discharge from the ward after attaining majority rendering full accounts and in the necessity for sanction before alienation, the Modern Law is like the Roman Law. Under the modern Law, according to some systems, the sanction is to be of the family council, according to the English and American, of the court. The Roman Law recognised three stages in a person's immaturity. First, when he was incapable of acting, the second when his acts required the ratification of his guardian and a third stage when he was legally competent to act but was given a person to give counsel and advice. The first stage was for 7 years of a man's life, the next stage continued till he was 14. The last after 14 till 25. No man was however compelled to have a curator against his will after 14

unless insane, or engaged in law suit or unless a debtor wished to compel him to receive a debt. Guardianship *ad litem* is a survival of the old Roman system of curator for suit. Except as to criminal responsibility and except in a way as to voidablility of contracts, the English law does not make a difierence between the first two stages in minority. Early Roman Law recognised perpetual guardianship to women but the later law gave it up and no modern system recognises it. Modern law has assimilated curatorship and guardianship and assigns a guardian till the age of majority whose duties and functions are the same throughout. The Roman law appointed curators for insane persons, spendthrifts and other naturally incapable persons. Though the English system does not recognise guardians for spendthrifts, some other systems do. For insanes, idiots and imbecials, all systems appoint guardians. Guardianship was considered a public duty in Rome. It is the same under modern systems, the king or the state being regarded as the *parens patriae.*

In the University of Penyslvania Law Review (we take this from the Canadian Law Times where the article is reproduced) ·Mr. Layton B Register discusses the contributions of various nations to the Commercial Law or the Law Merchant, as it is technically called, how it is the resultant of the customs and adjudications of the courts of the Italian Trade guilds, the law administered to the conglomeration of merchants from all parts of the world to the *Fairs* in France, the customs of the Hanseatic League, the three codes of maritime law, the *consulate of the sea* in the Catalan language that appeared in Barcelona in the XII century, the Rolls or judgments of Oleron which were the law on the Atlantic coast and the laws of Wisby that obtained in the Baltic Coast.

The place of honor in the Journal of the Society of Comparative Legislation for October is appropriately given to the now famous address of the Lord Chancellor on *Higher Nationality.* Dr. H. P. Stevens makes an attempt to reconstruct the condition of the law of the Roman Republic in the age of the Punic Wars by a study of the dramas of Plautius. We find there indications of right by birth which we still have under the Hindu Law. We find the transition from unfeed advocates to advocates feed, possibly on the sly. The Romans seem to have already arrived at a dignified notion of marriage contract.

Mr. Amasa M. Eaton records a protest against the practice of some courts to ignore the Negotiable Instruments Act where there is

one and to refer only to the previous decisions. The very object of codifying the law being to obviate the necessity of having to roam over a vast mass of precedents, it is wrong on the part of courts to perpetuate the old condition of things by referring to the very precedents which are superseded and which, in addition, may or may not wholly agree with the Code.

BOOK REVIEWS.

The Indian Decisions (New Series) by the Lawyer's Companion Office. Vol. III. We beg to acknowledge the receipt of the 3rd volume of this series—Madras section. This brings us to the end of 10 Madras, that is, about half way to the end.

The law of Benamee transactions by C. S. Saminatha Sastry B.A. B.L. and P. Ramanatha Iyer B.A. B.L. First Grade Pleaders (1913). We trust that the book will be found useful by the profession as a convenient hand book containing the case law on the subject of Benami transactions. The value of the book would have been considerably enhanced if the authors had paid more attention to scientific treatment. The authors would have done well to define 'Benami' and to explain the various senses in which that term has been used before laying down tests of Benami. A Benamidar may be a mere alias or prete nom as the Privy Council call him in a recent case and this is the usual meaning of the term; he may be an agent, he may be a nominal transferee from the real owner, he may be the ostensible vendee under a real sale, he may be the purchaser with the funds of another or of others including himself; he may be acting for others; or he may not be. In addition, there are possibilities of benami gifts and even benami wills being set up. All these cannot be disposed of by one uniform treatment. The legal incidents of one kind of Benami must be entirely different, from another kind of benamee. To have pointed out the distinction and the precise incidents of each of the various kinds of benami would have cleared much of the confusion surrounding the subject and have been a real service. The chapter on the origin of the English law of Trusts seems to us to be wholly out of place. Similarly the discussion as to the origin of the Hindu law of trusts. In addition, it is inadequate. Far from assimilating Benami to known legal relationships, the authors seem to have assimilated numerous other legal relationships to Benami, hardly a luminous way of dealing with the subject.

The Madras Law Journal

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THE MALABAR BILLS.

The prevailing public opinion in North Malabar about the Bills of the Hon'ble Mr. Raman Menon, seems to be that the Marumakkathayam Law as at present administered in Law Courts should be reformed, not on the lines suggested by Mr. Menon but on the footing of customs accepted by the community as what the law ought to be. It is the absolutism of the Karnavan and the inactivity and indolence fostered by the Tarwad system, that have long stood in the way of individual enterprise, and the growing tendency of the Anandravan to separate himself from the rest of the Tarwad rather than fight with the Karnavan, has already begun to evince itself. An Act of legislature that would tend to develop this spirit of enterprise is quite welcome, but a measure such as the one proposed which aims at a complete overthrow of the Marumakkathayam Law at a single stretch, can never meet with the approval of Malabar. It must not be supposed for a moment that the people of North Malabar are devoid of feelings common to all humanity. They fully agree that one portion of a man's self-acquisitions should go to his children. They would have gladly supported the bills, if they were not as they are, opposed to the very spirit of Marumakkathayam Law. Their complaint is that the learned framer of the bills has gone rather too far. He does not seem to be satisfied with placing the Marumakkathayam Hindus on a level with other Hindus here and elsewhere. He goes a step further and applies the Indian Succession Act to the followers of Marumakkathayam Law, although S. 331 of that Act expressly exempts Hindus, Budhists and Muhammadans from its operation. It is true that their feelings and sentiments have altered a good deal since the introduction of Western Science and Civilization, and it is equally true, of course, that the prevailing idea of married life is repugnant to the feelings of an educated mind; but that does neither necessitate nor even justify the placing of the Marumakkathayam Hindus on a level with domiciled foreigners, Eurasians, East Indians and Native Christians. I am of opinion that it has been quite inexpedient on

the part of the Honourable member to introduce such a subversive measure, so prematurely and any attempt to secure the adhesion of North Malabar, is, I think, destined to prove an utter failure.

I propose therefore to point out for the consideration of those who are interested, more particularly of the Honourable member and the Government on what points the educated section of the Marumakkathayam people of North Malabar disagree and I shall also suggest in the light of their sentiments, the ways in which the bills may be made more acceptable to them. It invariably happens in a North Malabar tarwad that a member acquiring properties by his own personal exertions, allows them to be purchased in the name of his children on the one hand and sisters and sisters' children on the other in equal or unequal moieties or purchases them in his own name and then bequeaths or otherwise divides them in a similar proportion or when he has died intestate, his brothers and sisters willingly and ungrudgingly give a portion of such properties to his children, as if they claimed it as a matter of right, unless there are special reasons for them to act otherwise. Whatever might be the custom of old, this is the present custom; but the law is still unchanged in substance. I am of opinion that law should accord with custom and not custom with law. Though there has been no substantial change in the law, still there has been some change, indeed. The Malabar Law of to-day was not the Malabar Law of 25 years ago and is not likely to remain the same 25 years hence. But for the fact that our Courts have refused to depart from the dicta of some of the Judges of the High Court based upon the principles of Malabar Law as understood in olden times, the practice above referred to would have long ago become the established custom of the country, and the law would have been, and that would be good law too, that one half of the self-acquisitions of a member of a Malabar tarwad, should go to his children and the other to his brothers, sisters and others constituting his own Tavazhi. The Malabar Marriage Act was not accepted by the people as it was opposed to their sentiments, and in consequence it has proved a thorough failure. I am of opinion that no law can prosper, unless it is in consonance with the customs of the subject-people.

In the first instance, therefore, I shall discuss Ss. 21 and 26 of the Partition and Succession bill, which are calculated to shake the Marumakkathayam Law to its very foundation. S. 21 reads thus :—" The self-acquired property left undisposed of by any person who belongs on the date of his or her death, to an imparti-

ble tarwad, shall be inherited by his or her wife or husband and children on the one hand and by his or her *tarwad* on the other." We cannot possibly lose sight of the advantage afforded to us by the Full Bench decision of the Madras High Court in *Krishnan Nair* v. *Damodaran Nair*[1] where their Lordships, *Benson*, Offg. C. J., and *Sankaran Nair* and *Sundara Aiyar* JJ. have unanimously held that the self-acquisitions of a female member of a tarwad, should according to the present customs of Malabar, descend to her own *Tavazhi*, and not to her tarwad. Although the question as to the devolution of the self-acquisitions of a male member, did not, in that case, arise for their Lordship's decision, I think the tendency of the High Court as will be seen from their judgments, is to treat alike the self-acquisitions of a male and a female, in the matter of inheritance and I hope that when a case involving the question is taken up to the High Court, they will decide it accordingly. In view of the above ruling I would also have it that no part of a woman's property should be inherited by her husband. I am therefore of opinion that the section should be modified accordingly and one of the grievances often complained of, would then be redressed. Passing on to S. 26, we see a distinct line drawn between the self-acquisitions of a member of an impartible tarwad and those of a divided member of a partible tarwad, the undivided state of a partible tarwad being altogether ignored, as I shall hereafter notice. Inheritance by sister and sister's children form the nucleus of the present complex tarwad system. Partition may be granted for the sake of peace and for various other reasons. There is no doubt that we love our brothers and sisters and next to mothers' it is our love for them and theirs' for us, that we cherished from our childhood, and we are unable to judge how much they have exerted themselves for our well being. For these reasons I think it only just to allow them also to inherit our property. It may be argued that no hardship can result from it being the common law that only wife and children shall inherit such property ; but then it would be equally true that there can be no hardship if the existing state of affairs is continued, and legislation in the matter would be unnecessary, if legislation is intended to remove a hardship. I am inclined to think that if the rationalistic view, above, is not to be accepted, a rule of law by which our brothers and sisters are allowed to have the benefit of our acquisitions, with our children, will have the effect of levelling up an inequality of fortune. To do justice to our brothers and sisters on the one hand and our children on the

1. (1912) 24, M. L. J. 240

other, I may propose that the rule of inheritance, laid down in the case of the self acquired property of a member of an impartible tarwad, may, subject to modifications suggested above, be extended to the case of a divided or undivided member of a partible tarwad also. In this connection the term " Tavazhi " has to be defined to mean and include the acquirer's mother and her descendants, and in default, his maternal grandmother and her descendants and no further beyond. It would then become necessary, that S. 27 of the Partition and Succession Bill and S. 12 of the Marriage and Inheritance Bill be expunged.

We shall now turn our attention to the other Sections of the Bills. The Moplas of North Malabar follow Marumakkathayam law in certain matters and Mahomedan Law in certain other matters. They have their tarwads and Karanavans ; in this respect they follow Marumakkathayam law. They have forms of marriage and dower agreeable to the rules of Mahomedan Law; and in this respect they follow Mahomedan Law. Further, the Madras High Court has held in *Bava* v. *Pathumma*[1] that the inheritance of a Mopla governed by Marumakkathayam law, should be regulated by the rules of Mohammadan law, unless the existence of a custom to the contrary be established. It is therefore clear that the Marriage and Inheritance Bill cannot apply to them. The question, then, is whether the Partition and Succession Bill applies to them, and, if so, to what extent. Succession and Inheritance are co-extensive and if the question of inheritance does not arise, the question of succession also does not. Ammu Sahib Bahadur, the experienced Tahsildar of Chirakkal and an influential member of the Mopla Community, whom I have consulted in the matter, says that they wish for legislation to the effect that the self acquisitions of a male member of a tarwad, do descend to his wife and children on his death, according to Mohammadan Law, and certain other gentlemen confirm his view. Though the custom invariably is that children are given or take such acquisitions exclusively, it appears that when the matter is taken up to Law Courts, the law is found to be different and they seem to deeply regret this state of affairs. They cannot agree with us. They are Mohammadans, and, if possible, they want to follow their own law. As regards Partition, Mr. Ammu says that the bill should not affect them, that their tarwad properties may be considered as trust properties divisible with the consent of all the beneficiaries and if the bills are intended to apply to them also, he should strongly protest against it.

1. (1912) M. W. N. 912

Apart from these considerations, one would be obliged to think that North Malabar Moplas have been left out of account altogether; when we see " Hindus " in the preamble, we have to conclude that the Moplas have been omitted; but when we see " Followers of Marumakkathayam law " in S. 1., we are induced to suspect that Moplas have been included. I should think that Mr. Menon has forgotten the existence of this community, and I do not think that the bills need be made applicable to them also and so the word " Hindu " may be inserted before " followers of Marumakkathayam law " in S. 1.

PARTITION AND SUCCESSION BILL.

In S. 2, the following terms may also be defined with advantage :—Tavazhi, Impartible Tarwad, Tarwad necessity, Partition, Collector and Self-acquisitions. I shall presently show how the definition of each of these terms will be useful.

S. 3:—Parties having recourse to the procedure prescribed in this section and in S. 7, should be allowed all possible convenience, and with this object in view, I would suggest that the Collector may be empowered to delegate his powers to any Gazetted subordinate of his, but the order passed by such officer may be subjected to confirmation by the Collector. The word " Collector" may therefore be defined to include such subordinate also.

S. 6:—The meaning of this section does not seem to be clear. It may mean that no appeal lies from an order of the Collector or it may mean that no civil suit lies for setting aside an order of the Collector. There is no doubt that there ought to be provision that no such suit is maintainable. But if it is intended to mean that no appeal lies, there is evidently no reason why an order granting an application should not likewise be final. Whatever the motive may be, I should think that in fairness to all parties, the rule of finality of orders rejecting an application for registering a tarwad as impartible should be extended to orders granting such an application also. As regards the non-maintainability of a civil suit, a new section may be added, or if S. 6 is intended to cover a civil suit it may be made clearer.

S. 12:—Questions may invariably arise as to what are the purposes for which a Karnavan is authorised to spend tarwad income. Hitherto the misleading expression "Justice,equity and good conscience" was guiding our courts for want of a Code. Now that a Code is to be brought into being, I do not know why it should not be specific on such points also. I think we shall do well to adopt the

well-established, though vague and too general rule of Hindu Law that a manager is empowered to spend the joint family income for legal necessities and the term "Legal necessities" may be adopted into "Tarwad necessities", and the term "Tarwad necessity" defined in S. 2.

S. 16:—This and the two succeeding Sections appear to have been framed with the object of restricting the powers of the Karnavan of an Impartible Tarwad, in the matter of creating debts binding on, and granting leases of, tarwad property. Under this Section, a Karnavan has power, without the consent of the other major members of the tarwad to mortgage tarwad property with possession for a period of six years and also grant leases of such property for a similar period. I think that the period of six years fixed is arbitrary. The Karnavan should have power to lease and mortgage, tarwad property if, at all, he should be given such power for a maximum period of 12 years, considering the fact that a Kuzhikanom lease for a period of six years or less, would be useless, and that, ordinarily, a Kanom is to enure for the benefit of the kanari at least for 12 years. See *Kelu Nedungadi* v. *Krishnan Nair*[1]. It may, however, be provided that the Karnavan shall account for all premiums and other profits derivable from leases or mortgages of tarwad property, and the allowance of 5 per cent. to the Karnavan for his trouble, may be raised to 10 per cent. See S. 14.

S. 17:—The expression "except as provided for in S. 16" placed in the beginning of the section seems to be a little confusing. It may be construed as meaning that for no tarwad necessity a Karnavan may mortgage tarwad property with possession for six years. That is clearly not the intention of the Honourable member. This mistake is apparently due to a misplacement of the expression, and it has to be made more intelligible by placing it before "without the consent of all the major members &c." In the second part of the section the words "or each of the Tavazhis" may be inserted immediately after the words "of the senior male and female members of the Tavazhi".

S. 18:—When we read this Section with S. 16 it seems to me that they contradict each other. Either the words "except as provided for in S. 16" may be prefixed to this section or the power of the Karnavan to mortgage tarwad property, may be taken away, or the word "debt" in this section may be explained to mean "hypothecation debt or simple money debt."

1. (1903) I. L. R. 26 M. 727 (F. B.)

S. 19:—The word "proportionate" is likely to mislead a court of law. The Karnavan of a tarwad consisting of ten members and having an annual income of Rs. 5,000 may be called upon to pay Rs. 500 to each of the members, in the light of this section and the result will be that the Karnavan will get nothing for his trouble and S. 14 will become meaningless. Here the word "reasonable" may be substituted for "proportionate" and the necessary changes may be made and what is a reasonable amount will always be a question of fact determinable with reférence to S. 14 or the words "Subject to the provisions of S. 14" may be prefixed to this Section.

S. 21:—The wife and children may be allowed to inherit half the property and the other half must go to his Tavazhi. In default of the one class the other must get the whole. A wife inheriting with children shall be entitled to proportionate maintenance and a wife inheriting without children shall have a life estate in the property inherited, and on her death, the property shall revert to her husband's Tavazhi. To my mind, this mode of devolution appears to be just and reasonable under the circumstances.

Before leaving the Partition and the Succession Bill, I have to bring to the notice of the reader the fact that the Bill contains no provision as to the conduct of a Karnavan of a partible Tarwad that may, all the same, choose to remain joint. We see many a family around us and abroad, governed by Hindu law remaining joint notwithstanding the fact that at the instance of a single member, the whole family is liable to break up and I do not know how, we can fail to foresee the possibility of a similar state of things in families which are not declared impartible. The matter is, however, easy enough. The rules regulating the conduct of the Karnavan of an Impartible Tarwad may be extended to such families also.

MARRIAGE AND INHERITANCE BILL.

I have already discussed the Inheritance Part of the Bill and I shall close the communication with a few remarks on marriages.

Under Hindu law as well as Muhammadan Law, a man can have two or more wives at the same time. But under neither law is a women allowed to have more than one husband at the same time. To speak nothing of the evils of the custom I should think that the advantages are more. At all events, if, on account of this custom, the Hindus should be deemed to be a barbarous people, I do not know how we can escape the stigma so long as we remain Hindus. My suggestion therefore is that clause (*b*) of S. 3 may be so modifi-

ed as not to disturb the existing law. Nothing is perfect under the sun. No social system can be said to be perfect. There are certain matters in which we ought to imitate the West. I do not think we are right in trying to imitate the West in religion and in social customs.

S. 3 Clause (c) is directly inconsistent with the greatly extended view that the Honorable member has taken so far as partition and inheritance are concerned. The existence of castes and sub-castes has long troubled our leaders, and movements are already on foot for the fusion of the sub-castes among whom intermarriages are prohibited. I am of opinion that the attempted fusion, if accomplished, would be greatly beneficial to us. I would therefore omit cl. (c) S. 3.

I do not thing that S. 4 Sub. S. iii and Sections 4 to 10 are workable. I do not think we are in need of divorce Courts at all. Why do we want the help of the Court for the dissolution of marriages? Our Sambandhams can be performed very easily. The presence of one or two local elders, and a few formal ceremonies, constitute what is called a "Sambandham". I should think that, if a divorce is effected in the presence of at least two such elders, that must be held sufficient. It is very easily said in S. 7 that "an order shall be passed dissolving the marriage" Before passing such an order, we do not know what all questions may be raised by the adversary? He or she may say in answer, that he or she was quite willing to give his or her consent and that the petition was unnecessary and that he or she would not be liable for costs. The other party will insist on costs, and it will again be a matter of oral evidence and give rise to scandalous expositions in open Court. I am therefore of opinion that sub-section 3 of S. 4 and Ss. 5 to 13 should be omitted altogether. I may, however, suggest that S. 23 of the Partition and Succession Bill may be incorporated with this Bill.

I hope that in the foregoing lines I have merely voiced the sentiments of the people of North Malabar following Marumakkathayam Law. I have no doubt that the measure now proposed is a highly desirable one; but I am constrained to think that till Malabar is fully Westernized, such a measure can never be relished. I believe that no legislation can practically alter the customs of a community unless the popular sentiments are predominantly in favour of the change. No legislature can effectually stand in the way of an adult man and an adult woman, living practically as man and wife, if they are so disposed. I am of opinion that the

present marriage system among the Marumakkathayam people can never be said to have no legal sanction, since it is quite in accordance with the customs of the country.

A Nair woman in North Malabar invariably lives with her husband after marriage, but in South Malabar, I understand, the custom is different. Divorce is unknown in Tarwads of respectable standing, and is, generally speaking, very rare. There is no denying the fact that chastity is a virtue in a woman and there can be no breach of the rules of chastity if a woman remains unpolluted by any man except her own husband. I do not see any harm in allowing a man to marry as many wives as he wants if he can maintain and keep them all in harmony. I am inclined to think that such a state of things will save a man from being instrumental in polluting the virtuous habits of a maiden. On this point I have the authority of Dr. J. T. Sunderland, an American admirer of Indian habits and customs.

M. RAMAN NAIR.

NOTES OF INDIAN CASES.

Jatangir Muncherji Lali v. The Bombay Baroda and Central India Railway Company.—I. L. R. 37 B. 575.—The enunciation of the law by Mr. Justice *Davar* in this case as regards the position of a passenger where a portion of his person extrudes out of the inside limits of a railway carriage in which he is being carried seems to be unexceptionable although we are doubtful of the application of the principle in this case. There can be no doubt that in an earlier case cited by the learned judge *Dullabji Sakhidas* v. *G. I. P. Railway Co.*[1] the law was laid down too broadly. In applying the principle the learned judge seems to have assumed that the plaintiff was aware or ought to be aware that there was a danger which would possibly affect him. But for the fact that the door in the stationary train was left open the accident would not have happened and the leaving of the door open, was surely due to the negligence of the Railway Company and was the direct cause of the accident and in the face of this to say that the plaintiff in protruding his person has so directly contributed to the accident as to make his act the immediate cause seems to us to give the go-bye to the real question in the cause.

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1. (1909) I. L. R 34 B. 427.

Bhimabai v. Tayappa Murar Rao.— I. L. R. 37 B. 598.— The decision of the Judicial Committee in *Boobun Moyee's case* has formed a text for consideration in different cases and it cannot be said that there has not been any uniformity in the construction placed upon it by the different High Courts. It has been thought in some quarters that the Judicial Committee went beyond the principles of Hindu Law in pronouncing the adoption invalid and in the limits which it laid down as regards the capacity of a Hindu widow to adopt. We cannot share in any such view. It must be admitted that there should be some limit placed upon the power of the widow to adopt. The Bombay High Court in this case has adopted the principle that when an estate is vested in an heir, whether that heir is a son's widow or any other, the power of adoption of the father's widow or mother, if any, is at an end.

Hanmant widow Rakhmaji v. Anrajl Hanumanta.— I. L. R. 37 B. 610.—There is no doubt about the correctness of the decision in this case and we are glad to note that the Bombay High Court has taken a sensible view. We cannot, however, concur in the sentiment expressed by Mr. Justice *Beaman* that the former practice of not writing judgments is desirable and right " as tending to relieve a hard worked mofussil judiciary from a heavy burden of clerical work." That the mofussil judiciary is hardworked every one will admit and that they should be relieved of much of clerical work one may also agree. But we cannot agree that writing judgments amounts to clerical work or that the judges should be relieved of writing judgments even though in cases coming under O. 41 R. 11. It is only by the judgment that one can know whether the mind of the judge has been applied to all the material facts and circumstances and whether after that application the judge has come to the conclusion at which he arrives.

Bhoji Mahadev Parab v. Ganga Bai—I. L. R. 37 B. 621— There was a maintenance decree which declared a charge on family property. Whether it was on particular family property or on the entire family property does not seem to be clear although from the report of the facts it would seem that the charge was of the latter kind but no question has been raised whether that charge is indefinite and so not capable of being enforced as such and we have no reason to suppose that where a decree expressly creates such a charge the same cannot be enforced. In fact the learned Judges of

the Bombay High Court give effect to the charge later on. The decree was in 1902. Before any execution was taken the plaintiff purchased some of the family properties in 1906. In 1907 the decree-holder applied for execution and one of the properties purchased by the plaintiff was attached and sold in 1910. The learned judges hold that there was no *lis pendens* and following the decision of the Calcutta High Court in *Kulada Prosad Chatterjee* v. *Jageshar Koer*[1] they hold that the plaintiff's purchase was subject to the charge created by the decree. The decision of the Calcutta High Court, however, does not give effect to the right of the prior purchaser and the decision of the Bombay High Court referred to by the learned judges (*Mohan Manor* v. *Tagu Uka*[2]) also shows that a sale in execution of a mortgage decree is free from all subsequent incumbrances and the redemption in that case was allowed only on the ground that the subsequent purchaser was not made a party to the suit but in the case under discussion there was already a decree. The subsequent purchaser was only a representative of the judgment-debtor and no second suit was necessary or would lie. Under those circumstances we can hardly understand the decision of the learned judges that the subsequent purchaser should be allowed to redeem. Again we can hardly understand the decision of the learned judges that the plaintiff should claim the money from the court purchaser. He should certainly pay the charge if the equity of redemption is still outstanding. Of course if the decree creating a charge could not be executed as such we can understand the decision of the learned judges that the plaintiff's sale was only subject to the charge. Even then we cannot understand how the plaintiff would be entitled to redeem in the suit that he brought. Altogether we cannot regard the decision in any way as satisfactory.

SUMMARY OF ENGLISH CASES.

National Telephone Company Limited and another *v.* His Majesty's Post-Master-General: [1913] A. C. 546 (E.)

Appeal—Maintainability of—Reference to Court on matters in dispute—Usurping jurisdiction by entertaining appeal, how to attack.

Where by statute certain matters in dispute are referred to the determination of a Court of Record with no further provision, the necessary implication is that the court will determine the matters

1. (1899) I. L. R. 27 C. 194
2. (1885) I. L. R. 10 B. 224

as a court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same. An appeal therefore lies even though the reference could be made only if the parties agree to make the reference.

If a Lower Appellate Court had usurped jurisdiction by entertaining an appeal when no appeal would lie under the statute, the way of setting aside such usurpation of powers, is by filing an appeal to the higher Court.

Sandeman and Sons *v.* Tyzack and Branfoot Steamship Company Limited [1913] A. C. 680 (Sc.)

Common Carrier—Suit for freight—Loss of goods—Bill of lading—Exemptions—Shortage in delivery—No right to freight—Liability for undelivered goods.

A shipowner, receiving several bales for delivery to a consignee, is bound to deliver all the bales to the consignee before he could claim freight for it. A clause in the bill of lading exempting him from liability in case of his inability to deliver the goods on account of "obliteration or absence of marks" will not relieve him from his liability for shortage. Not only is the suit for freight liable to be dismissed owing to non-delivery of all the goods but the ship-owner is also answerable for the counter-claim for the value of goods not delivered.

The fact that owing to obliteration or absence of marks the goods of some of the consignees became so mixed as to be indistinguishable is no answer for shortage in delivery to one of them who is entitled to receive in full all the goods that were sent to him.

Mason v. Provident Clothing and Supply Company Limited [1913] A. C. 724 (E).

Agreement in restraint of trade—Enforcement of, only if reasonable—Evidence of reasonableness—Question for Court and not for jury—Public policy, what is.

Agreements in restraint of trade, which are not made to protect the sale of a goodwill or to guard against the disclosure of special trade secrets, will not be enforced by Court if they are unreasonably severe and go beyond what is really necessary, for the due protection of the promissee's interests. The question of

reasonableness in such a case is one for the Court and not for the jury. Evidence cannot be given on the question of validity or of reasonableness, although evidence can be given as to the nature of the business and of the employment and also as to any practice which is usual among business men as regards the terms of the employment, not because this can determine the legal question of what is reasonable, but because what is usual is to some extent a guide in the consideration of the requirement of the particular business.

The true view at the present time is this : The public have an interest in every person's carrying on his trade freely : so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions as noted above, based on expediency of protecting trade secrets and enforcing reasonable restraint of trade.

The standard of public policy must be the standard of the day and what was laid down as to public policy a long time ago may be of little use in settling what the actual standard is.

British Columbia Electric Railway Company Limited v. Stewart [1913] A. C. 816 (J. C.).

Statutes—Construction of—Repugnancy between statutes of the same year—Later statute to prevail.

It there is a repugnancy between two statutes of the same year the later statute prevails.

Grand Trunk Railway v. McAlpine [1913] A. C. 838 (J.C.).

Railway Level Crossing—Duty to warn wayfarers—Warning to be only reasonable—Injury to be actionable must be the result of breach of statutory duty—Damages, when recoverable.

In the case of a Railway Company which is obliged under a statute to give timely warning to wayfarers on the approach of the train near level crossing it is not necessary for the protection of the company that the victim should hear the warning. It is only necessary that the warning should be such as ought to be apprehended by a person possessed of ordinary faculties in a reasonably, sound, active,

and alert condition, and the time given to avoid the danger should be such as would be reasonably sufficient for such a person as the one abovementioned to avoid it. If a company permit persons whose faculties it knows to be defective to cross the line, that knowledge may possibly impose upon them the duty to take greater care than would be required towards the ordinary wayfarer who is not so affected.

There is no such rule of law in England, as that if a person about to cross a line or lines of railway looks both ways on approaching the track, he need not look again just before crossing it.

Even a plaintiff whose negligence has directly contributed to the accident, can recover damages, provided it be shown that the defendant could by the exercise of ordinary care and caution on his part have avoided the consequence of the plaintiff's negligence. Similarly, if the accident though due to the breach of the duty was the result of the folly and recklessness of the plaintiff himself, he cannot recover any damages.

Meyer and Co. Limited *v.* The Sze Hai Zong Banking and Insurance Co. Limited:

[1913] A. C. 847 (J. C.)

Negotiable Instruments—Crossed cheques—Payment of, by cheques, to one not a banker—Estoppel of the drawer.

A drawer of cheques crossed generally, who regularly allows his bankers (the defendants) to make payment for the cheques, to his own cashier or agent for collection in the shape of new cheques drawn by the bankers on others, is estopped from denying his cashier's or agent's authority to receive payment of the cheques from his bankers (the defendants), and such substitution of cheques is in law equivalent to payment.

If the cashier or agent misappropriates the proceeds of the new cheques by giving them to his own account, the drawer cannot throw the loss on his banker. This is essentially a case in which, as between two innocent persons, one of whom must suffer by the fraud of a third person, he should suffer who, by his conduct has enabled such third person to occasion the loss.

[Compare Sec. 126 to 129 of the Negotiable Instruments Act.]

Mair v. Rio Grande Rubber Estate Limited:
[1913] A. C. 853 (Sc.)

Contract—Contract to take shares—Rescission of—Prospectus—Fraudulent representations in—Liability of Company.

A company which issues a prospectus inviting subscribers to take shares, is responsible for the absence of fraud or misrepresentation in respect of the statements made therein whether those statements are made directly by the company itself or are made by an agent or director of the company and virtually adopted by the company by inserting the same in its prospectus. A subscriber who was induced to take shares on the strength of such statements is entitled to rescind his contract on proof of the fraudulent character of the representations.

In re **Allsod : Whittaker v. Bamford**: [1914] 1 Ch. 1 (C.A.)

Trustee—Judicial Trustees Act, S. 3—Acting reasonably and honestly—Power to excuse breach of trust—Paying to wrong persons on misconstruction of will, on legal advice.

This case turned on the construction of S. 3 of the Judicial Trustees Act of 1896 which gives the Court power to relieve a trustee from liability for breaches of trust when he has acted honestly and reasonably. In this case, the trustees acting upon legal advice, handed over the income of a fund to one set of persons whereas according to the construction finally put upon the will by the Court it ought to have been paid to another set. The will was obscure and the property not being large it could not be said that the trustee acted unreasonably in not going to the Court for a construction of the will. Held, overruling the opinion of *Warrington* J. that the Court had power to excuse and under the circumstances the trustees ought to be excused.

De Lisle v. Union Bank of England: [1914] 1 Ch. 22.

Mortgagor and mortgagee—Debenture stock as collateral security—Conversion of stock by mortgagee—Sub-mortgage of land—Sub-mortgagee bound to give credit for value of debenture.

Plaintiff mortgaged some land to his Solicitor to secure the advance by the latter of the purchase money and gave as collateral security some debenture stock which was transferred to his name. The solicitor without disclosing the extent of his rights over

the debenture gave it as security for his general indebtedness to defendant Bank. The Solicitor next sub-mortgaged the land by way of equitable deposit to secure his general indebtedness. Plaintiff sued to redeem the mortgage. The question was, what were the relative rights of parties. *Held* so far as the debenture stock was concerned, the Bank having had no notice of the arrangement between the parties, was entitled to have it as security for the solicitor's general indebtedness. But as regards the mortgage the question was different. Notice or no notice, the bank as a sub-mortgagee was bound by the state of accounts between the mortgagor and the mortgagee. Before the sub-mortgage the mortgagee having converted the debenture to his own use, the mortgage amount stood reduced by its value and the bank was entitled to get in the redemption action only the reduced amount.

In re Midland Express, Limited : Pearson *v.* The Company : [1914] 1 Ch. 41.

Debenture holders—Interest of some paid before charge crystallised—No priority in respect of interest unpaid.

This was an appeal from the judgment of *Sargant* J. reported in (1913) 1 Ch. 499. The question was whether debenture-holders whose interest remains unpaid at the date when the charge is crystallised are entitled to say to the other debenture holders who rank *pari passu* with them who have been paid their interest, that their own interest in arrears should first be paid and then only the amount realised should be rateably distributed. The court of Appeal held agreeing with Sargant J. that they were not entitled to any such priority as regards the interest. The state of things existing at the date the charge is crystallised, should be accepted and distributions must proceed on that basis.

Eastwood v. Ashton [1914] 1 Ch. 68 (C. A.)

Misdescription—B. H. farm, in occupation of tenants, of certain measurement—Sale of—Reference to plan—Plan including more, effect of.

Property called B. H. Farm in the occupation of two named tenants and of certain measurements and " more particularly described in the plan " attached to the sale deed was sold to the plaintiff for a certain price. It so happened that a portion of the property marked in the plan was in the adverse possession of other

persons and the purchaser could not obtain possession of it. He sued for damages in respect of it. The description in the document did not cover it; only the plan covered it. Held under the circumstances, the description in the document should prevail. Reference to the plan was merely a *falsa demonstratio* which did not vitiate the description in the document. Judgment of *Sargant* J. in (1913) 2 Ch. 39 reversed.

In re Harper: Plowman *v.* Harper: [1914] 1 Ch. 70.

Will—Construction—To unmarried daughters of H and G, equally—Meaning of.

The testator in this case gave a legacy to be equally divided between the unmarried daughters of her brother-in-law Dr. H and Dr. G. Two questions arose upon the construction of the will. First whether the legacy was intended for Dr. G or for his unmarried daughters only. Secondly assuming Dr. G was meant, whether he took a moiety of the legacy or had to go shares equally with the unmarried daughters of Dr. H. The balance of authority is in favour of reading the legacy as one to the unmarried daughters of Dr. H and to Dr. G. *Sargant* J. preferred to rest this construction upon the circumstances of the case viz., that the testatrix had no reason to make the daughters of Dr. G the objects of her bounty in preference to him, that Dr. G had only an unmarried daughter of four and there was little chance of any occasion arising for a distinction between married and unmarried daughters. On the second point, his Lordship held that Dr. G was to go shares with the daughters of Dr. H equally and was not entitled to a moiety.

Millbourn v. Lyons: [1914] 1 Ch. 34.

Sale—Contract of sale—providing for restrictive, covenant for the benefit of vendor's land—Land sold away before conveyance —Effect of.

A contract for the sale of certain property provided for a restrictive covenant in respect of the user of the property sold for the benefit of the other adjoining properties of the vendor but before conveyance, all the other properties of the vendor were sold away without reference to the restrictive stipulation.

Held that the property sold was free from the restrictive stipulation as at the material date viz., the date of sale, the vendor had no property to which the benefit of the covenant could attach.

In re Morrison, Jones and Taylor, Limited Cookes v. Morrison Jones and Taylor Limited: [1914] 1 Ch. 50 (C.A.)

Hire and purchase agreement—Putting up a machine on the premises—Right to enter and remove on default in payment—Equitable interest in land—Subsequent Debenture—Prority between.

In this case a patent automatic machine was put up by the respondent on the appellant's premises on a hire purchase agreement giving the former power to enter and remove the machine in the event of default in the payment of the instalments due under the agreement, Subsequently and without giving notice of this agreement, appellants created a floating charge. The question was which of the two had precedence.

Held that the interest of the respondents was an equitable interest in land and the charge-holder's interest being also only equitable, they ranked in order of time and the former had precedence.

Smith v. Streatfield [1913] III K. B. 764.

Defamation—Libel—Privileged occasion—Co-defendants—Malice of one—Joint tortfeasors' liability.

The author of a pamphlet printed it and circulated it among persons having a common interest in it. The pamphlet contained defamatory statements against the plaintiff. In an action against the author and the printer both pleaded justification and privilege. The jury found that the justification was not proved and the author was actuated by malice but that the printers were not.

Held that the privilege extended to the printers but that the malice of the author defeated the privilege for both and both being joint tortfeasors were jointly liable.

Herd v. Weardale Steel Coal and Coke Co. Ltd. [1913] III K. B. 771 (C. A.)

False Imprisonment—Miner—Coal mine—Refusal to work—Employers not affording facilities for leaving the mine.

A miner descended a coal mine as usual at 9-30 in the morning to work for his employers, the colliery owners. On reaching the

bottom he was asked to do some work which he wrongfully refused to do. At 11 a. m. he asked his employers to be taken to the surface in the lift. Permission was not given him till 1-30 p. m. He was in consequence obliged to remain there against his will. In an action against his employers for damages for false imprisonment;

Held by Buckley and Hamilton L. JJ. (Vaughan William L. J. dissenting) that the action was not maintainable. As there was no contractual obligation between the plaintiff and the employers, the colliery company, to afford facilities for his return under the circumstances the refusal to afford facilities did not constitute false imprisonment.

JOTTINGS AND CUTTINGS.

Women and the Legal profession:—The Court of Appeal on Wednesday last dismissed the appeal against Mr. Justice Joyce's decision in *Bebb* v. *The Law Society*. Miss Bebb brought an action against the Law Society, asking for a declaration that she was a 'person' within the meaning of the Solicitors Act, 1843, and a mandamus to compel the Law Society to admit her to qualify as a solicitor. The action was dismissed on the ground that women are by the common law disqualified from becoming solicitors, and that modern legislation has not removed this disqualification. This decision having now been affirmed by the Cout of Appeal, it is to be hoped, to quote Mr. Justice Byles' words in *Chorlton* v. *Lings* (1868), that the failure of the appeal 'will for ever exercise and lay this ghost of a doubt which ought never to have made its appearance.' The considerations, indeed which determined the unanimous decision of the Court of Common Pleas in that case against the right of women to vote at parliamentary elections apply with even greater force against the right now claimed by women to practise as solicitors. It was contended there that if women had not at common law the right to vote, the Representation of the People Act 1867, gave them the right. In the present case it was admitted that, if there actually existed a prohibition under the common law against the right of women to practise as solicitors, the Solicitors Act, 1843, did not remove the prohibition. No astute interpretation of any modern statute will avail women who desire to enter the legal profession until they show that they are not disqualified by the common law, and this we venture to think they will not succeed in doing. Every argument on their behalf must come back to the touchstone applied by the Court of Common Pleas in

Chorlton v. *Lings*—the usage of centuries must be the governing consideration. Ingenious arguments built upon the supposed analogy of the offices of churchwardens, sextons, etc., must come to the ground as soon as they come in contact with the hard fact that no woman ever has been admitted to practise as a solicitor in the English Courts. 1913. Law Journal p. 710

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The Liabilities of Private Prosecutors:-ACTIONS for malicious prosecution and for false imprisonment, though somewhat analogous and sometimes confounded, are perfectly distinct, and a private prosecutor is often liable for the one cause of complaint when he is not for the other. The distinction between the two is sharply brought out in the recent case of *Walters* v. *W. H. Smith & Son*, in which the Lord Chief Justice delivered a considered judgment—his first—last week (December 3), after hearing arguments on the legal points involved. The defendants, the well-known book selling agents, having suffered repeated losses from one of their bookstalls, had given the plaintiff, who was an assistant at it, in charge for the theft of a particular book which was found to be missing, but had not, in fact, been stolen. On the plaintiff bringing his action for damages for false imprisonment and malicious prosecution,the jury found (1) that the defendants had taken no reasonable care to inform themselves of the true facts, (2) that they honestly believed that the plaintiff had stolen the book, (3) that they reasonably believed that the plaintiff had stolen moneys and stock other than the particular book, and (4) that they were not actuated by malice in instituting the proceedings. The judge ruled that there was no absence of reasonable and probable cause for the prosecution, and on these findings the plaintiff failed upon the claim for malicious prosecution. But the claim for false imprisonment remained, and it was urged for the plaintiff that, as it turned out that no felony had in fact been committed in respect of the particular book on which the charge was made, there was no defence to this claim. Now the gist of an action for false imprisonment is that a trespass has been committed by one man against the person of another by arresting and detaining him without legal justification, and the defendants contended that all they need establish as legal justification for the imprisonment was (*a*) that an actual felony or felonies had been committed, and (*b*) that they had reasonable and probable cause for suspecting the plaintiff of such felony or felonies. In other words, it was argued that it was not essential to the defence to prove that the felony for which the plaintiff was arrested had in fact been committed. That contention

the Lord Chief Justice, after an elaborate review of the authorities, rejected, holding that it was contrary to the common law that a private person could justify his action in causing the arrest of another on suspicion, without being able to prove that a felony had actually been committed, and that the felony proved must be that for which the arrest was made. This has, it is true, never been expressly decided before, but the classical authorities, Hawkins' Pleas of the Crown and Hale's Pleas of the Crown, show that this has always been the accepted view, viz., that to justify an arrest the private prosecutor must show that the very same crime for which he made the arrest was actually committed.' To hold otherwise now would, as Mr. Justice Byles said in one of the leading cases on the suject, be 'disturbing foundations,' and the Lord Chief Justice was conservative enough in a case involving the liberty of the subject not to find lawful excuse where the very basis had failed upon which any such defence must rest. This first reserved judgment of his is a model of accurate reasoning, and will long be cited as statement of the whole law on the subject.—*Ibid* p. 711

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Lord Justice Buckley, who responded on behalf of the Bench, (at the annual meeting of the Solicitor's Benevolent Association) said by the time a man reached the Bench it was certain that everybody in the profession knew pretty well all about him, and after he got on the bench it became more emphatically true. His capacity if he had any and his failings—he was sure to have some—were apparent to all those who appeared before him. But he ventured to express the hope that, although the profession knew all about the members of the bench, they liked them all the same. He desired to say a few words upon one of the phenomena of the age in which we live. He supposed that law and order might be described as the expression of the thoughtful and determined wish of the majority, while disorder might be expressed as the hurried and hysterical expression of the minority. In our age, as it seemed to him, we were spectators of a marked disagreement between law and order on the one hand and disorder on the other. The first means by which law and order were supported was the willing consent of all those who had to obey the law. .Of course, it was true that the ultimate resort was to force, but society was so organised that, if possible all law and order rested on common consent and not upon force. Disorders, on the other hand, resorted to force as its first, as well as its last, expedient. We were witnessing in our day a strong contention between those two forces. In proposing that toast they were

toasting a body representative of law and order, and they were expressing the wish that law and order might prevail. There were those who thought, and it was a very serious matter indeed, that to-day we were witnessing a state of things in which not only was law and order not primarily supported, but there was a strong disposition to yield to disorder, and a strong disposition not to maintain that which a judge determined to be the proper sentence, to pronounce, say, on a criminal, but to regard rather the frenzied and hysterical expression of the minority. He supposed they all felt that in the Bench must ultimately reside the support and maintenance of order, and therefore he hoped that in every society of Englishmen this sentiment might prevail, that before everthing the law, be it what it will, was for the moment to be obeyed. Anyone who thought that the law was not right was perfectly entitled to say so and entitled to endeavour to change it but the first duty of every good citizen was to support the law and not to allow it to be set at naught. This was a matter which, he confessed, lay very near his heart. It struck him as a melancholy fact, leading he knew not where, that there was abroad a spirit by which every minority chose to say, 'The law does not suit me ; I am going to do something else ; and if you do not fall in with what I think to be right, I shall indulge in any criminal act which may seem to me sufficient to terrorise you into doing what I think to be right.' He accepted the toast as an expression of opinion on the part of those who drank it that they intended to support the law and not to support disorder.—*Ibid* p. 720

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The Lord Chief Justice, who presided at the annual dinner of the Savage Club, in the course of his speech, said that in a somewhat strenuous life he had not been able to indulge in the pleasures of club life as much as he would have liked. But he looked forward to the time when that fault would be cured. In that as a lawyer he would be following precedent. He gave them the name of his distinguished predecessor, Lord Alverstone, who was so glad to be present at some of their meetings, and rejoiced always at being there. They were all glad to know his health was improving. 'I promise myself,' Sir Rufus continued, 'that I will seek to follow the precedent Lord Alverstone set. I say to you in all earnestness I never hear myself addressed or referred to as Lord Chief Justice of England without most serious trepidation. I think of the long line of distinguished and illustrious figures who have preceded me in that office, which was founded by William the Con-

queror. I think of the great names who have left their mark in history and upon our laws. And I feel daily, when I take my place in that chair, that never was a truer word spoken than when Chief Justice Cockburn said he trembled when he sat in that chair, and had to administer justice, because of the thought of the long and illustrious line of men who preceded him.—*Ibid* p. 722

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An Age Limit for Judges.—Not a few notable judges have continued to render most valuable service on the Bench when they have been octogenarians. Baron Wood delivered a judgment in 1822, when he was eighty-two, which caused the Lord Chief Baron, according to 'Price's Exchequer Reports,' to publicly congratulate him upon the 'unimpaired vigour and unabated learning which he had evinced that day in the discharge of his high duties.' To take a more modern instance, Lord Macnaghten remained the greatest force on the Judicial Committee when his years numbered more than eighty. But the Commissioners recognise that the question of the compulsory retirement of judges is not to be determined in the light of exceptions, however brilliant they may be, and they recommend that all King's Bench judges appointed in the future should retire on attaining the age of seventy-two, unless a committee, consisting of the Lord Chancellor, the Lord Chief Justice, and an ex-Lord Chancellor—why not the Master of the Rolls ?—shall request them to continue to serve for a further period to be specified. Veteran judges have sometimes been known to lag superfluous on the Bench, and the Commissioners' proposal will we believe, be generally recognised as a fitting solution of a rather delicate problem. It is accompanied by some fair, if unexpected, proposals as to judicial pensions. Judges who retire after fifteen years' service are to continue to be entitled to a pension of 3,500*l.* a year, but for judges who retire with a shorter record of service a sliding scale is to be introduced. For instance, a judge who resigns after five years' service or less, is to receive only 1,500*l.* a year, but for every additional year he serves he will be entitled to a further 200*l.* If he serves for ten years—and a judge is to be entitled to retire at the end of this period whether or not he is incapacitated—he will be entitled to a pension of 2,500*l.* A cognate proposal made by the Commissioners has frequently been advocated in these columns. They propose that all retired judges should be eligible, on the request of the Lord Chancellor, to serve as supernumerary judges in town or on circuit, the service being optional in the case of judges who have served for fifteen years, but obligatory in the case of judges who, not having

retired because of old age or ill-health, have served for a less period. A reserve of judicial force will thus be created which can easily be utilised whenever the Courts, owing to the illness of members of the Bench or the abnormal duration of important trials, are threatened with the recurrence of arrears.—*Ibid* p. 727

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New Trials in Criminal Cases.—On more than one occasion the Judges of the Court of Criminal Appeal have expressed their regret that they have no power to order a new trial. The Commissioners, believing that it would 'tend to limit frivolous appeals and prevent miscarriage of justice on purely technical grounds,' recommend that the Court should possess this power. We venture, for our part, to doubt the expediency of the proposal. The Council of Judges, when they proposed the creation of a Court of Criminal Appeal in 1892, were strongly against prisoners being re-tried for the same offence. 'To prevent oppression,' they said, 'the Council think that there ought not to be new trials in criminal cases, and that, if the first conviction is quashed, the accused ought not to be put in jeopardy again.' Would not a new trial of a prisoner be something in the nature of a mockery? The jury at the second trial would know, not only that they were burdened by a prior conviction, but that the Court of Criminal Appeal had quashed it only on a technical ground. When the Commissioners speak of 'miscarriage of justice on purely technical grounds' they forget that the Criminal Appeal Act expressly empowers the Court to avoid any such result.

> The Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

In several cases, no doubt, prisoners have escaped the punishment they deserved because the Court has adopted a narrow interpretation of the powers which the Act has conferred upon them. The principle that an accused person ought not to be put in peril a second time for the same offence is, however, so time-honoured and beneficial that not even the occasional escape of a notorious offender ought, without very grave consideration, to be treated as an excuse for departing from it. A readier use of the power they possess would enable the judges to 'prevent the miscarriage of justice on purely technical grounds.'—*Ibid* p. 727

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The 'Black Cap'.—Attention has been drawn to the fact that Mr. Justice Ridley did not assume the black cap in passing the death sentence upon the woman at the Central Criminal Court whose condition made it necessary for a jury of matrons to be empanelled. Though the putting on of the black cap is customary, it is not obligatory, and Mr. Justice Ridley was well justified on this occasion in omitting the grim formality. The black cap owes its origin to the Order of the Coif, and, according to Serjeant Pulling, the historian of the Order, its existing use is in keeping with its primordial purpose. The coif, he explains silk, was originally a close-fitting, head-covering made of white lawn or silk.

The Black cap, or sentence cap, of the Judges and Serjeants is the covering expressly assigned to veil the coif on the only occasion when the coif was required to be hidden. By the ancient privilege of the Serjeant the coif was not to be taken off in even the Royal presence. The chief insigne of the Order, it was to be so displayed when sitting on the Bench or pleading at the Bar, but this rule seems always to have been departed from in passing sentence of death. The head of the administrator of justice was then covered or veiled as a token of sorrow by the black sentence cap.

If this were the origin of the black cap—and some authorities have taken a different view—it long ago ceased to be used merely as a token of sorrow. One of the best-known portraits of Coke shows him with a black cap upon his head, and in Dugdale's time the judges 'sat at Paul's with their caps at the Sermon,' and wore their 'coyfs and cornered caps' at the reading of the Commissions. Even in Coke's and Dugdale's day, therefore, the black cap had become an ordinary part of judicial costume. That, quite apart from its associations with the death setence, it remains. The Lord Chief Justice always wears his black cap in receiving the Lord Mayor at the Royal Courts of Justice, and all the judges on State occasions, such as the re-opening of Parliament, carry their black caps in their hands. Here, so far at any rate, as the first ceremony is concerned, is no occasion for mourning or sorrow.—*Ibid* p. 727

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Mr. Justice *Bailhache*, who presided at a social meeting of the Royal Courts of Justice and Legal Temperance Society, held in the Old Hall, Lincoln's Inn, on December 11, said that if anybody wanted to be converted to the cause of temperance he would like to make him a judge. He had only been a judge for just over a year, and he thought he would be within the mark if he said that fully one-half of the criminal cases he had tried in his short time whether of violence or otherwise, had been due directly or indirectly to drink. For his own part he was for many years what was

known as a moderate drinker. But there came a time when he was faced, as it seemed to him, with the duty of setting an example to some people who were in the habit of drinking too much. He determined to make a trial of total abstinence. That was seven or eight years ago, and he had not since taken alcohol in any shape or form. He was quite disposed to say that moderation was in some respects a higher virtue than total abstinence. But when they considered how people fell into the habit of drinking he thought it behoved all of them to set an example on this subject.—*Ibid* p. 739

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The Work of the Courts.—At the close of his first sittings the Lord Chief Justice was able to make a statement as to the work of the King's Bench courts upon which he is heartily to be congratulated. So rapidly did the King's Bench judges get through their work that when they rose for the Christmas holidays there was scarcely an action ready for trial which remained undisposed of. The business of the King's Bench Division is, indeed, now in a better condition than that of the Chancery Division, which has lately been held up as a model of dispatch. In the King's Bench courts actions have been tried which were set down within a week or two of the close of the sittings, while of the Chancery Division little more can be said than that all the cases entered at the beginning of the term have been disposed of. The state of the Court of Appeal, on the other hand, has gone from bad to worse. Only 60 of the 203 final King's Bench appeals standing for hearing in October have been disposed of, and 62 have since been entered. No Workmen's Compensation appeals were heard during the past sittings, and the number has increased from 26 to 64; but it is right to add that these cases are to be taken immediately on the resumption of business in January. The Lord Chief Justice, Sir Samuel Evans, and Mr. Justice Neville will sit in the Court of Appeal next sittings, and the formation of a third Court will, doubtless, result in the Appeal list being cleared of its arrears. It may be hoped that the other Divisions will not unduly suffer by reason of these 'chopping and changing' arrangements.—*Ibid* p. 743

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The Grand Jury.—The Grand Jury the abolition of which is recommended by the Law Commission, may be said to have outlived its usefulness, though it must be remembered (says the *Westminister Gazette*) that it had at one time an important position in the struggle of the people against the Royal prerogative. Blackstone put the case succinctly when he said that it afforded a guarantee

that 'no man shall be convicted except by the unanimous vote of twenty-four of his equals or neighbours, twelve on the grand and twelve on the petty jury.' Also when communications were less open the Grand Jury was useful as a means of ascertaining, through the Judges on Assize, the feeling of the countries on current topics. Latterly some Judges have been apt to use it as a means of airing their own opinions on questions of the day. Sir Henry Hawkins took a different line. 'Some Judges', he wrote, 'had been used to discourse with the Grand Jury of our foreign relations, turnips, or the state of trade; but I took a more humble theme at Ayldsbury.' His theme was a pungent complaint of the lodgings assigned to the Judges, and he was accustomed to conclude with a congratulation 'not only on there being very few prisoners, but also on the fact that you are not holding an inquest on our bodies.'—*Ibid* 754

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Is Drunkenness a sufficient ground for reducinq Murder to Manslaughter—In Rex v. Griffiths, on 17th ult., the Court of Criminal Appeal had before it the question whether drunkenness is sufficient ground for reducing murder to manslaughter. The Court adopted the rule laid down in Rex v. Meade (1909), 1 K, B. 899, that if the slayer was so drunk as to be incapable of knowing that what he was doing was likely to cause serious injury, the killing is only manslaughter. This may, therefore, now be taken to be the settled modern law on this point.—Law Student's Journal, p. 220

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The French System.—The French system of Jurisprudence as compared with ours seems somewhat curious. English, and for a matter of that American judges invariably support their opinions by reference to, and in the light of, previous decisions; whereas in France the judge is expressly forbidden to give a previous opinion as a reason for the judgment he is giving. There are therefore in France few printed reports, and the French lawyer is not confronted with the thousands of decisions and precedents with which the Anglo-American lawyer has to deal. The result is that the French Courts are free to render their judgments in their own way, only having to bear in mind the general principle of the code applicable to the facts of the case, and there is little doubt that in the administration of law in France justice is pretty sure to obtain. It may be said that we have the advantage of greater certainty, that is to say, the client can be advised that as his case is on all fours with some other case the result in the present proceedings would be the same. There is surely a good deal for and against each system.—*Ibid* p. 220

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Great Seal.—Lord Haldane, asked by a reporter in Montreal if he had brought the Great Seal over with him, is said to have replied that he under stood a large fish had followed his boat, and he "had no doubt that it was the Great Seal."—*The Green Bag p. 56.*

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A queer Will.—One of the briefest and queerest wills on record is that of an old Western farmer who, though reputed to be rich, died penniless. His will ran: "In the name of God, amen. There's only one thing I leave, I leave the earth. My relatives have always wanted that. They can have it."—*Exchange.*

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A Lawyer—"The young fellow who's coming to see you, Elsie, must be a lawyer."

"What makes you think that, father?"

"Because I notice whenever he comes to court he always pleads for a stay."—*Baltimore American.*

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Lawyers' money—"Well, son, now that you've graduated, what are you going to be?

"I think I'd like to be a lawyer, sir. There's a good deal of money passes through a lawyer's hands, isn't there?"

"He never lets it pass through if he knows his business, my son."—*Boston Transcript.*

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Curiosity.—"Among the most amusing incidents I've ever seen in court," says a Cleveland lawyer, "was that which occurred recently in my town.

"A big chap stood at the rail completely swathed in bandages. One might say that little of his face was visible, aside from one eye that peered through an opening in the bandages.

"'You are charged with disorderly conduct,' said the Court.

"'So I understand,' said the man at the rail, 'And I want to be hold for trial.'

"This was a decidedly unexpected announcement; and every-one in court was correspondingly astonished.

"'I should think,' said the Court, after a moment's hesitation 'that you would plead guilty now, and pay a fine of five dollars ending the matter.'

"'I thank your Honor,' said the man, 'but I want to be tried.

"Why?'

"'For this reason,' explained the mussed-up man. 'The last thing I remember was that I was standing very peaceably on a street corner. When I came to, two doctors were busily engaged in sewing me together. I want to be tried so that I can hear the stories of the witnesses. That's about the only way I'll ever find out what came off.'"—*The Green Bag p. 455.*

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Happenings in Court.—"Now, your Honor," began the shrewd, grizzled old attorney, "this has been long and tedious trial, but it becomes very simple when resolved down to its basic elements. Let us see what we have here. There is the old bachelor, with no known relatives. Then there is the middle-aged woman, and the young man, both of whom the old bachelor takes a special interest in, whatever it may be. The old bachelor is wealthy, and he dies, leaving to this middle-aged woman, the defendant here, his fortune of £200,000, and to the young man, the plaintiff here, so much thereof as she herself, the defendant, shall elect. Those are the very words of the will. That makes it very simple. Now, all the pleadings here, the testimony introduced, and the admissions of the defendant herself on the witness-stand show that she has chosen and elected out of the immense fortune, £190,000, and has given the boy only £10,000. That is clear, undisputed, and admitted by the pleadings and by the defendant herself. Upon those facts, and upon the will itself, the whole case become very simple. You see this will expressly provides that this son shall have so much thereof as this lady here shall elect. She having elected £190,000, the plaintiff asks for that as his just share of the estate. Upon that state of facts, the plaintiff rests his whole case."—*Ibid p. 487.*

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Not to be Caught.—A justice of the Supreme Court of New York has a habit, well known to old practitioners before him, of asking three questions of counsel arguing at the bar. The first question is usually a simple one—the lawyer answers carelessly; the second question is a little more difficult—the respondent answers with some uncertainty; the third question is bound to be a "poser" fraught with humiliation.

On one occasion, when a lawyer who was quite familiar with his Honor's little habit was presenting a most important case, he replied in answer to the first question:—

"I don't know."

"Don't know?" said his Honor. "Why don't you know?"

"Because, your Honor," said the wily attorney, "I haven't heard the other two questions!"—*Ibid p. 488.*

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Entertaining Jokes Willie.—"Paw, what is a jury?"

Paw.—"A body of men organized to find out who has the best lawyer, my son."—*Cincinnati Inquirer.*

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"Rastus, what's a alibi?"

"Dat's provin' dat yoh was at a prayer-meetin' whar yoh wasn't in order to show dat yoh wasn't at de crap game whar yoh was."—*Life.*

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A Plowden joke! He was taking coffee in his club on a certain evening when a fellow member remarked that hot coffee was not a good summer drink. "You should take cooling drinks," he advised. "Have you tried gin and ginger beer?" "No, but I've tried a number of men who have," he replied.—*Law Notes p. 3.*

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Laudatory of a lawyer.—Mr. Leslie Scott was hasty in his assertion that no passage can be found in English literature laudatory of a lawyer. As many pointed out, Crabbe and Borrow both praise lawyers. Moreover, is not Dickens' Mr. Perker in reality laudatory? Mr. Perker is what the ladies call "a dear old thing." Then, as the *Globe* points out, what about the great Dr. Johnson? "Lawyers," said Dr. Johnson, "know life practically. A bookish man should always have them to converse with. They have what he wants." His own associations with the legal profession were certainly not wanting in intimacy, for Boswell was a member of the Bar, and Hawkins, his other biographer, who was also one of his executors, was an attorney. He thought, indeed, so highly of the profession that he wished he had joined it. Sir, he said to Boswell, "it would have been better had I been of a profession. I ought to have been a lawyer." "I do not think, sir," Boswell remarked, "that it would have been better. for we should not have had the English Dictionary." "But you would have had reports," replied the Doctor. At one time, indeed, Johnson did seriously think of studying the law.—*Ibid p. 6.*

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It is wonderful that any praise can be found of lawyers. The public never come to us until they are in a mess, and, win or lose, we are bound to lighten their pockets somewhat. The public never loves anyone who lightens its pockets unless in return it gets pleasure. However, we tough-skinned old lawyers can live without the approval of the public.—*Ibid p. 5.*

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Woman Judge.—Miss Sorensen, who has been appointed a district judge for Hammerfest, in Northern Norway, is probably the first woman judge officially elected to that position in the world. Miss Sorensen has practised for years as a lawyer at Christiania, and was for a considerable period leader of one of the greatest feminist organisations in Norway.—*Ibid p. 5.*

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Interruption of a lawyer by the Judge.—On one occasion Mr. Strachan, the great Scotch lawyer, happened to be addressing a jury before Lord Fraser. Mr. Strachan was standing close to the Bench and was losing himself in the excitement of his case and thumping volumes of Rettie on the table beside him. Lord Fraser thereupon said: " Mr. Strachan, excuse me for interrupting you in your address. It is not altogether that I am frightened for any personal injury, but I wish you to kindly remember that these volumes are the lawful property of the Faculty of Advocates." Mr. Strachan once rebuked a judge for interrupting. After interposing on several occasions, this judge said: " Look here, sir, your arguments are just going in at one ear and out at the other." " Well, my Lord, what is there to prevent it ?" queried counsel.—*Ibid p. 5.*

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A New Culprit.—A wide variety of persons and things have been blamed for " the law's delay." Lawyers, judges, the courts, technicalities all have drawn their share of the blame. A new culprit has now been located. Mr. Levy Mayer, a Chicago attorney, is the discoverer. In a recent address he said:

"From one end of the country to the other the courts are burdened and overburdened with the labor of trying to find out the meaning of the law-giver. And you complain of the increase in courts and their functions, of the increase in the number of the members of the bar, and doubtless complain of the increase in the expense necessarily incurred in running your well fitted and well constructed law departments,"—*Law Student's Helper p. 4.*

* * *

Last Ditch Fight.—An old gentleman, now deceased, never seemed to be satisfied unless he had several cases pending in court. He left surviving a son who seems to have followed in his footsteps and has continued to keep up his father's record of proceedings in court.

Several of the attorneys were talking about his court troubles one day; when one of them told the following about the old gent:

The old gent had just won a case in the justice court, when the loser, in a very combative frame of mind, exclaimed: "I'll law *you* to the circuit court."

Old Gent—" I'll be thar."

Loser—" And I'll law you to the Supreme Court!"

" I'll be thar."

" I'll law you to 'ell."

" My attorney'll be thar."—*The Docket.*

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Non Compos Mentis.—A commission in lunacy had called a woman to the witness stand.

"And now," said the commission's counsel to her, " what is your ground for claiming that the accused is insane ?"

The woman gulped, wiped her eyes, and answered :

" Well, gentlemen, he took me to the theatre twice in one week. Each time we went in a taxicab, we had supper each time after the performance; and each time he bought me chocolates and flowers. He did'nt go out to see a man between the acts, either."

" But, madam," said a commissioner, " surely these actions do not prove insanity on the accused's part."

" But you forget, sir," said the lady, with a sad smile, " you forget that the accused is my husband."—*San Francisco Argonaut.*

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Questions of Legal Ethics.—An attorney, in the course of representing a client in certain specific matters, is informed by the client that certain real estate is held by a third person for him (the client) in the third person's name, the property having been transferred by the client to the name of the third person for the purpose of avoiding a judgment, that deed being placed on record, the client, however, having taken back a deed from the third person to himself, this deed remaining

off record and in the client's possession. The information is given to the attorney in the course of a general discussion, and entirely disconnected from any matter in which counsel's service or advice had been given.

The client afterwards fails to pay the attorney for the services rendered. Suit follows and judgment is recovered by the attorney. Execution is issued and returned unsatisfied. It appears then that the collection of the judgment, and therefore compensation to the attorney for his services, will be impossible unless he is permitted to proceed after the real estate in question and permitted to show that the same really belongs to the debtor client.

1. Would it be improper for the attorney, in enforcing his claim for compensation against his client by legal process, to attempt to reach his client's interest in the real property, thus necessarily disclosing in the proceedings, and utilizing for his own benefit, his client's statement to him, collection otherwise being impossible?

2. In legal proceedings for the enforcement of the claim, can the attorney properly call upon another attorney, who prepared and took the acknowledgments to the deeds of conveyance and reconveyance, to testify respecting the transaction?

The answer of the Committee of the New York County Lawyer's Association is:

In the opinion of the Committee, to preserve inviolate his client's confidence is a fundamental ethical rule of our profession, binding upon every lawyer. This rule is now embodied in our New York Code of Civil Procedure, Section 835, and has been rigidly applied, but with certain apparent exceptions. With such possible exceptions in mind, the majority of the Committee is still of opinion that the attorney should not, in the case submitted, utilise for his own benefit the confidential statements of his client; and it would therefore answer Query No. 1 in the affirmative, and Query No. 2 in the negative.—*The Law Student's Helper p. 20.*

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The Lumps Identity.—The whizzing motor car struck a stump, and one of the occupants of the back seat, a lady possessed of considerable embonpoint, executed a neat but not gaudy parabola in the atmosphere and alighted by the roadside like a polypu falling from a short tower.

"I don't believe I have broken any bones," she stated, in reply to the inquiry of the omni-present by stander, "but there is a lump on this bank that"—

"Lump—nothin!" snarled a smothered voice "I'm the constable that's goin' to arrest yougosh-dinged joy riders, if I live!"—*Judge Ibid p. 27.*

CONTEMPORARY LEGAL LITERATURE.

In the Law Quarterly Review for January, Mr. Arthur Cohen considers the effect of the Marine Insurance Act, 1908 on the law on that topic. Mr. Arthur Underhill gives a brief discription of Lord Haldane's Real Property and Conveyancing Bills. The object of these seems to be to simplify conveyancing and land tenure. One of the proposals is to abolish all kinds of tenures and substitute instead one uniform freehold tenure. If the Bill becomes law, the copyhold tenure, the tenures of Gavelkind and Borough English and perpetually renewable Caseholds will all disappear. Mr. J.C. Ledlie contrasts the German system of legal education with the English and makes a suggestion that the German method of insisting upon the student having a comprehensive survey of the whole field of law preparatory to more detailed study of particular department might be adopted. Mr. J.C. Fox seems to question the view taken by the House of Lords in *Scott* v. *Scott* that disobedience of the order of the Court prohibiting publication of evidence taken in cameriais not criminal contempt. The difference between criminal contempt and the other kind of contempt called contempt in procedure lies in that punishment in the latter is mainly for enforcing private rights. Mr. Charles L Wells tells us why it was that there was great opposition in the beginning to trial by jury in Criminal cases. The reasons were manifold. In the first place, the people that charged the man were also the jury that had to try him. Secondly, in the beginning at least, the jury decided on their own information and as the accused were not allowed counsel, there was no means of persuading them or even exposing them. Again, the accused by the other modes of trial permitted by law e. g., Wager of battle, oath &c., had better chances of getting off than by trial by jury. Accused could not tried by jury without his consent One of the approved methods of getting the consent was by weighing the accused down with iron. This practice was legal till 1772 when it was abolished and an accused who refused to plead was taken to plead not guilty.

To this day in Japan foreigners cannot acquire absolute rights in land. In practice, this does not work hardship as they can acquire

all interests short of it and also there is no objection to corporations registered in Japan acquiring land though composed of aliens. It is proposed to bring out a law giving rights to acquire land except in, certain cases to all foreigners whose state allows the Japanese similar privileges in their own dominions. The paper of Mr. Leslie Scott on " the effect of War on contract" read before the conference of the International Law Association at Madrid is reprinted here. First he considers its effect as between the subjects of belligerent states. The effect of war on the power of citizens of belligerent states to trade with one another depends on the municipal law of their respective states. In some the municipal law prohibits by special order all trading with citizens of the enemy state. In these states, such trading is legal unless specially prohibited. It is otherwise in Great Britain where the law prohibits trade with alien enemy, for the matter of that all contracts with the enemy. Contracts made in furtherance of illegal trading even though not made directly between the citizens of two belligerent states are illegal and void. Contracts with alien enemies entered into by subjects of an allied state also are void. Of course this rule does not apply to prisoners of war. Contracts before the war are as a rule only suspended unless they inure to the aid of the enemy or are from their character incapable of suspension (e. g. partnership). The writer next considers the effect of war on contracts between neutrals and the belligerent. It is one of the recognised fundamental rules that neutral subjects must remain neutral. They are at perfect liberty to carry on trade with the subjects of either belligerent except in so far as such trade is directly calculated to prejudice or obstruct the operation of war by one power or promote those of the other. A neutral flag covers enemy goods except contraband. Neutral goods are immune even under enemy's flag provided the goods are not contraband. The various ways in which a belligerent may interfere with neutral trade are (i) by exercising the right of blockade (ii) by capturing "contraband" articles (iii) by condemning "neutral". ships that are pronounced by their acts to have turned "unneutral" Certain things are "absolute" contraband that is things of a warlike character in course of transit to the enemy. Conditional contraband are things capable of either use and are subject to be confiscated only if destined for warlike use, When a ship becomes unneutral is a question of fact. The arbitrary rule that a ship more than half of whose cargo is contraband becomes unneutral first adopted by Russia, has recently been approved in the Declaration of London. Other facts also may show that the ship is unneutral *e. g.*, carrying despatches etc. Now suppose a shipowner is unaware at the time the ship is

chartered that it is going to be put to unneutral uses. Is he entitled if he comes to know of it before the ship starts to put an end to the contract or if the ship is condemned, is he entitled to compensation ? Take again the case of a policy of insurance. There is no implied warranty of neutrality in a policy either of ship or of goods. Has he no legal grievance if at the time of shipping the capture was a moral certainty. In the case of crews, they are entitled to treat the contract of service as at an end when the ship is used to unneutral purpose. Possibly the same rule would apply as between a shipowner and charterer. "Remoteness of terms or powers" is another article of importance but being concerned with technical rules of English Real property Law is of interest only to English Lawyers.

"The End of Law as developed in legal Rules and Doctrines" is the subject of a highly interesting article by Mr. Roscoe Pound in the Harvard Law Review for January. It is an attempt to analyse the reasons for the divergence between what is " Justice" in law and what is conceived as just in social sciences. He takes up the history of law in five periods. First he considers archaic law. In this law, "Justice" meant only a desire to keep the peace. Whatever served to avert private vengeance and private war was an instrument of justice. At first it attempted nothing more than to furnish the injured person a substitute for revenge. Where modern law thinks of compensation for an injury, archaic law thought of composition for the desire to be avenged. Where modern law seeks a rational mode of trial, Archaic law that which would yield a certain, unambiguous result, without opportunity for controversy and consequent disturbance of peace. The scope of the Law was very limited. Among the powers that made for order, it was the last in importance. Gods and society had very much more power. Law was mostly made up of regulations for self-help and its rules were in the highest degree formal. The legal unit was not so much the individual as groups of kindred. In the next period law is recognised, as the predominent regulative agency of society. As a consequence, law becomes developed, but at the same time, for fear of arbitrary exercise of power by courts, law is sought to be made definite leading in time, to rigidity and immobility. Courts are not allowed to go behind the form. Formalism was a feature of the archaic law and naturally survived in later time where it was considered a safeguard against arbitrary action. Extreme individualism is another characteristic of this period. It is not an indication of the views of the period as to the desirability of self

reliance but a survival of the primitive formalism. The end of law as understood in this period is security and its contributions to the general development of law are the ideas of certainty and uniformity and of rules and forms as a means thereto. The next stage is the stage of equity or natural law which tried to reconcile law with ethics. It threw off restrictions on legal capacity of individuals. It looked to the substance behind the form. It insisted upon good faith. The doctrine that one person should not be unjustly enriched at the expense of another is another contribution of this period to legal development. In attempting to reconcile law with ethics, on the one side equity attempted too much and on the other, it gave too much discretion to judges which naturally made law uncertain. This uncertainty led to a reaction and the rules of equity became crystallised into settled rules leaving no room for further development. The next stage is called by the writer "maturity of law" which aims at equality of opportunities to all men and security of acquisitions. Its contribution to the science of administering justice is the thorough working out of the idea of individual rights. Towards the end of the nineteenth century, a new tendency manifested itself which marks the last stage in the development of law so far, that is to say the tendency to *socialise* law. Limitations have been imposed upon the use of property so as to prevent their antisocial use; some limitations have been imposed on freedom o contract especially as between master and servant. Statutory limitations have been placed upon men's power of disposition of property. In several States, the wife is required to join in conveying homestead property and in the assignment of wages. Properties have been exempted from attachment limiting the power of the creditor to realise his debt. What was long considered as res nullius or res communes is more and more being recognised as res publicae *e. g.*, running water. The natural rights of parents have given way to the interests of the child.

The "still, sad music of humanity" is the somewhat fanciful heading of an article in the American Law Review for November—December which discusses the justificatiou for the presumption of innocence in law. In America there are two schools of thought, one represented by Greenleaf and the Supreme Court of the United states and the other by several state courts, Professor Thayer and others. The one says that there is not only the rule that guilt should be established beyond reasonable doubt but also that there is a presumption of innocence while the other maintains that the presumption is only a restatement of the principle that guilt should be established

beyond reasonable doubt. On an examination of the authorities it looks as if this presumption is one of recent growth; that as in the Roman, Mosaic and other ancient systems, the English rule also after centuries of growth was for long only the negative one *viz.*, that no man should be convicted without proof beyond reasonable doubt. Far from presuming innocence, English law commenced with a presumption of guilt until thanks to the jury system and the unanimity of opinion among the jury before conviction that was insisted upon the presumption against guilt arose. It was of immense service in times when the subject had greatly to fear from the oppression of the rulers. Now that the state of things is happily altered, the writer ventures the opinion that reference presumption of innocence may be omitted from charges to jury and they may be simply told that the guilt of the accused must be established beyond reasonable doubt. Habeas Corpus in the Federal Courts as a relief against state action is another article of interest. The writ is issued in all cases where a person is detained in custody for an act or mission which is justified by the law of the United States or of his own domicile or where the restraint interferes with some federal proceeding or denies the right conferred by some order of the federal court. Where the action is unjustifiable in one aspect but justifiable in another or where the question is one merely of procedure, the court does not issue the writ. In the Green Bag for October Judge William Cook of America tries to analyse the complaints the public have against the Bench and the Bar. They are according to the learned Judge: that the Judges, in a less degree lawyers lack human sympathy, that is to say the substance of human interests is subordinated by them to the abstractions they make of principles of law, that they are generally in opposition to progress and improvement that they blindly and irrationally worship at the shrine of precedent, that they deal in technicalities and exalt hidden meanings and that prolixity is their most besetting sin. For reproach the American Criminal Procedure with its eccentricities is in a class by itself. He is glad that the baser charge of infidelity to trust is never made against it.

Mr. Frederick Fish thinks that the American Patent Law is superior to that in other systems as it gives the patentee absolute control over the invention for a definite term having no payments to make and no fear of competitors while the other systems leave him little room for effort during the period of the patent. Under the present industrial conditions, he says that patent system is absolutely necessary and that even more protection

may have to be afforded in the future to inventors. In the November number of the same Journal, Professor Sherman puts forward "one code for all the United States" as the only remedy to cure American law of its confusion and uncertainty. He instances the Indian codes as affording a complete answer to those who say that Anglo-American law is essentially non-codifiable "The general estimate" says Professor Roy Temple House in the December number "which a reader of Gœthe might synthesise from his frequent allusions to the law is by no means complimentary to that august profession." In Faust for instance Mephistophes is made to say

> All rights and laws are still transmitted
> Like an eternal sickness of the race
> From generation to generation fitted
> And shifted round from place to place.
> Reason becomes a sham ; Beneficence a worry"

In the Netherlands drama "Egmont" we are told that "the rascal always has the advantage. As prisoner, he pulls the wool over the judge's eyes, as judge he takes delight in proving the innocent guilty." In the less well-known play "The Excited ones" occurs this curious estimate of the professions "I tell you child, a surgeon is the most worthy of reverence of any man on the whole face of the earth. The theologian frees you from sins which he has invented himself. The jurist wins your case and beggars your opponent, who has as good a right to win as you have; &c. &c." In one of his tragedies, we meet a Doctor Juris of the university of Bologna, whose countrymen fail to treat him with adequate respect as they suffer from the strange delusion that good sense is quite as valuable an asset as a head full of Justinian. Similarly a shrewd old gentleman marries his daughter to his adversary in a law suit on the theory that this is the only way of preventing the amount involved from becoming the property of lawyers. But for all his sarcasm, Goethe was a lawyer to the end of his life and a good one too.

BOOK REVIEWS.

Indian Evidence Act by Tarapada Banerjea revised by S. C. Mukerji M.A., B.L. (1913). Published by the Calcutta Weekly Notes Office. A fairly exhaustive commentary with extracts from judgments and text books to elucidate the principles of the sections of the Act, for its price, the book seems to be very good and we commend it to the profession.

The Indian Contract Act: by Mahendra Nath Roy, B. L.: Published by M. C. Sarkar Bahadur and Sons. It is a good idea of M. C. Sarkar and Sons to utilise the experience and learning of retired judicial officers for the production of useful text books and the present is one of that sort. To those that cannot go in for the more expensive commentaries on the subject, this cheaply priced volume will supply a real need. The author professes to have introduced all the decisions from the commencement of the Act up to date; though one may be tempted to challenge the accuracy of the statement it may be taken to be fairly accurate so far as the Indian Law Reports, the Calcutta Law Journal and the Calcutta Weekly Notes are concerned and the other journals too have not been neglected. The notes seem to be well arranged and good.

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INAMS IN THE MADRAS PRESIDENCY*

For the purposes of this paper, an inam may be defined as a grant of land by a former ruler or a Zamindar prior to the Permanent Settlement. An apparent exception to this definition will be dealt with at the end of this paper.

Such grants, when made by Zemindars were unauthorized and the State was not bound to recognise them. When the British Government, in the exercise of the immemorial and common law prerogative of the Crown in India to assess land or to exact from arable land its share of the produce (see *Boddupathi Jaganaudhan* v. *Secretary of State for India* [1], *Madathapadu Ramayya* v. *Secretary of State for India* [2]) proceeded to settle the Zamindaries permanently in 1802, the question arose as to how these inams were to be dealt with.

From this point of view Inams may be divided into four classes. There were (1) Inams granted for public purposes *e.g.*, to village servants in proprietary estates for performing services in which the public are interested, (2) Private or personal inams granted absolutely to the grantees, (3) Inams granted for religious or charitable purposes,

(4) Inams granted for rendering personal or private services to the Zamindars. We shall take these in order.

(1) *Hereditary village service Inams.*—These were excluded from the assets of the Zamindari and the Zamindar had no concern with their revenue which was treated as the emoluments of the particular office to which each inam was attached. In other words, they were annexed to the State.

(*a*) *The office of Karnam.*—This was regulated by s. 11 of Reg XXV of 1802 and Reg XXIX of 1802. Suits respecting the right to this office and the right to the inams attached to the office were (prior to 1894) cognisable by Civil Courts.

* Being the substance of a lecture delivered to the Apprentices Association by Mr. V. Rameeam B.A., B.L., High Court Vakil.

1. (1902) I. L. R. 27 M. 16. 2. (1013) I L. R. 27 M. 386.

(b) *Other village offices* in the Police and Revenue Departments were dealt with by Reg. VI of 1831 and the claims to these offices were adjudicated upon by Revenue Courts. Claims to such offices were not affected by the general law of limitation (Vide *Pichunayyan* v. *Vilakkudayan Asari* [1], *Palamalai Padayachi* v. *Shunmuga Asari* [2]).

The above regulations have been replaced by Madras Act II of 1894 so far as the offices of village Karnam, village Munsif and village Headman are concerned and in respect of all other village offices, Reg. VI of 1831 is repealed by Madras Act III of 1895. After the Full Bench decision reported in *Kandappa Achari* v. *Vengama Naidu* [3], there is no village office in proprietary estates (other than those governed by Madras Act II of 1894) which is not governed by Madras Act III of 1895. The last mentioned case settled the conflict between *Veerabudran Achary* v. *Suppan Asari* [4]; *Chinnayya Achary T.* v. *Moonappa Mudali* [5] on the one hand and *Mutyala Bapayy* v. *Kosuri Murramalla* [6] on the other. See also *Audiraju Veerayya* v. *Audiraju Sangayya* [7]. Under S. 17 of Act II of 1894, such of the village service inams as were not enfranchised in 1862, have been resumed and enfranchised and have ceased to be attached to village offices as their emoluments.

(2) *Personal Inams.*—These were excluded from the Permanent Settlement. They were either lakhiraj *i.e.*, held free of any payment or subject to the payment of a small quit-rent—also called Kattubadi, jodi or poruppu.

Where the grant was subject not to a light quit-rent but to a heavy payment, it is clear that the amount paid was rent and the grant can scarcely be called an inam. It would be a permanent lease. Hence all lands held rent-free or subject to a light quit-rent were excluded from the assets of the Zamindari (S. 4 of Reg. XXV of 1802). The matter of recognition of these grants remained for a long time in abeyance. In 1859, the Inam Commission was constituted. Such of the inams as were found to be *bona fide* grants were enfranchised and a quit-rent imposed on them. The amount of quit-rent varied according to the

1. (1897) I. L. R. 21 M. 134.
2. (1892) I. L. R. 17 M 302 F. B.
3. (1913) 24 M. L. J. 42.
4. (1909) I. L. R. 33 M 488.
5. (1909) M.L.T. 264.
6. (1910) M. W. N. 7.
7. (1910) I. L. R. 34 M. 177.

history of the Inam and was regulated by the rules of the Inam Commission. The work of the commission was legalised by Madras Act IV of 1862, and IV of 1866 and Act VIII of 1869 was passed to remove misconceptions as to the effect of enfranchisement and the issue of title-deeds by the Inam commission.

What exactly was the effect of an enfranchisement, how far it affected prior rights in the land was a matter which long agitated courts but is now finally decided by *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya* 1. For sometime, a distinction was sought to be drawn between Service Inams and other personal inams. That distinction too is no longer recognised. The important question whether the holder of a service inam holds it, after enfranchisement, as joint-family property or as self acquired property was argued in more than one case before the Madras High Court but no opinion has been expressed on it. The observations on this matter in *Gunnayyan* v. *Kamatchi* 2 can scarcely be said to settle the question.

Where the Inam was granted subject to the payment of a Kattubadi to the zamindar, the inamdar had to make two payments, as the result of the enfranchisement proceedings—*viz* (1) Kattubadi to the Zamindar and (2) Quit-rent to the Government. It is clear that in such a case, the Government gets two payments from the inam—*viz.*, (1) the quit-rent from the inamdar (2) that portion of the peishcush which is referable to the Kattubadi obtained by the Zamindar from the inam, which Kattubadi was included in his assets at the time of the Permanent Settlement. The Zamindar got the Kattubadi from the inamdar and paid peishcush to the Government.

The nature of Kattubadi has been discussed in various cases. It follows from what has been said above that, strictly, there is no tenure as between the Zamindar and inamdar· *In an enfranchised inam, the Zemindar has no reversion.* There is no relationship of landlord and tenant. *Lakshminarayana Pantulu* v. *Venkatarayan* 3; *Nallayappa Pillai* v. *Ambalavana* 4. The burden of paying the Kattubadi follows the inam but it is not a charge on the land and more than three years' arrears cannot be recovered *Vizianagaram Maharaja* v. *Sitaramarazu* 5, *Rathna Mudaliar* v. *Thiruvenkatachariar* 6. By special legislation, however, for

1. (1906) I. L. R. 30 M. 434.
2. (1902) I. L. R. 26 M. 339.
3. (1897) I. L. R. 21 M. 116 F. B.
4. 1903 I.L.R. 27 M. 465.
5. (1895) I. L. R. 17 M. 100.
6. (1899) I. L. R. 22 M. 351.

certain purposes, it may partake of the character of rent, *e.g.*, for the purposes of Ss. 38 and 39 of the Rent Recovery Act (*Muthusami Pillai* v. *Arunachella Chettiar* [1] and cf. the repealed clause (*c*) of S. 3 (ii) of the Madras Estates Land Act.) As to the amount recoverable as jodi, see *Sobhanadri AppaRau* v. *Gopalakrishnamma* [2].

Where the inam is not subject to Kattubadi, but is Sarva dumbala, the payment is all to the Government and none to the zamindar.

(3). If the inam was granted for religious purposes (as endowment of temples or mosques) or for charitable purposes (as endowment of choultries) the inam would be allowed to be held free of quit-rent so long as the purpose of the grant is fulfilled. When the purpose fails, the Government steps in and assesses the inam fully.

In the case of temple inams, an important distinction may be mentioned. The inam may simply be the property of the temple,in which case, the deity or the idol may be regarded as the inamdar or it may be the property of a temple servant held subject to rendering service to the temple as an archaka or a dancing girl. In the former case, the grantee is the idol represented by the trustee, in the latter case, the grantee is the temple servant; in the former case the grant is not subject to service, the inam being merely the property of the idol; in the latter case the inam is held by the inamdar subject to rendering service to the temple. In either case no quit-rent is imposed so long as the purpose of the grant is fulfilled.

In practice, it often happens that the archaka of a temple is or was also the trustee and it is a question of some nicety to determine whether a land in the enjoyment of the archaka is the temple land, managed by the archaka as trustee, or archaka service-land held by the archaka subject to rendering archaka service to the temple. In the former case, if a person different from the archaka is appointed trustee, he is entitled to dispossess the archaka and hold the land for the temple, making separate arrangements for remunerating the services of the archaka. In the latter case, the archaka is entitled to hold the land so long as he is the archaka. A *prima facie* test is whether the inam title deed mentions the archaka or the idol as the grantee.

1. (1905) I. L. R. 29 M. 79. 2. (1891) I. L. R. 16 M. 39.

(4) Where the inam was granted for private service to be rendered to the Zamindar, the presumption is that it was included in the assets of the Zamindari. Even when the services are dispensed with or fall into disuse, the Government have no right of assessing it (Vide the observations of Sir Barnes Peacock in *Raja Nilmony Singh Deo* v. *The Government and others* [1] approved by the P. C. in *Raja Nilmony Singh* v. *Bakranath* [2]) Whether the Zamindar can resume service inams depends on other considerations (see *Venkata Narasimha Appa Rau* v. *Sobhanadri* [3] but the Government cannot certainly resume the inam *Raja Venkataramayya* v. *Appalarazu* [4] followed in *Parthasarathi Apparao* v. *Secretary of State* [5]. Where the inam was an absolute grant to the Inamdar[9] subject to service and the service falls into disuse, the Zaminadar has only the satisfaction of having made a generous grant and has no right to resume the grant. Most of the Mokhasas in the Nuzvid Zamindari are of this nature. This was settled by a report of Mr. Taylor in 1862 and G. O. accepting his report See *Raja Venkatanarasimha Appa Rao* v. *Raja Rangayya* [6].

If, at this distance of time, a question arises whether a Mokhasa village or other inam grant was held on condition of public service or private service, in all cases where the services have fallen into disuse, the question is difficult to determine. Still the question has to be decided. If the services were public the State is at liberty to deal with it anyway it chooses *i. e.* either leave it in *statu quo* or put an end to the service once for all and resume the land *i. e.* assess it to revenue. If the service was private, the State has nothing to do with it. Such revenue as the State is entitled to get from this land in virtue of the Common law prerogative, was fixed long ago in 1802 and year after year it continues to get it as part of the peishcush imposed on the Zamindari. The question whether the service is public or private and the question whether the land was excluded from the assets of the Zamindari or included are mutually convertible questions. Each furnishes a test for deciding the other and whatever can be answered first presumably furnishes a key to unlock the mystery of the second. If the Government which is in possession of the accounts of 1802 showing the estimated

1. (1866) 6 W. R. 121 C. R.
2. (1883) I. L. R. 9 I. A. 109.
3. (1905) I. L. R. 29 M. 52
4. (1910) 20 M. L. J. 728.
5. (1913) 21 I. C. 871
6. (1906) I. L. R. 29 M. 437.

income of the zamindaries produces them, it is possible to answer the 2nd question but where the accounts are not available the first question has to be tackled as best as one can. In such a case, the burden of proof lies on the Government to show that the income of the land was excluded from the assets of the zamindari.

Where a *Zamindar* grants an inam subject to service or kattubadi or both out of the *Zamindari*, the land continues a part of the *Zamindari* so far as the Government is concerned (see S. 8 of Reg. 25 of 1802). Until it is subdivided, the Government is entitled to attach it for arrears of peishkush on the *Zamindari*. In common parlance such grants are called subsequent or Darmila Inams. It is clear they are no inams at all. They stand on the same footing as the Mokhasas dealt with in (4) supra both being part of the *Zamindari* for all practical purposes. Where such grant or Mokhasa is a whole village, it will fall under clause (e) of S. 3 (2) of the Estates Land Act and under clause (e) of S. 4 of Madras Act II of 1894. But if it is not a whole village it will be a portion of an estate as defined in clause (a) of the same section mentioned above and the owner of such land will be a landholder within the meaning of S 3 (5) of the Estates Land Act (see 17 I. C. 120). If the Mokhasa village or subsequent inam is subdivided, it will fall under clause (b) of the section mentioned above.

It has been held that where a subsequent inam is granted subject to kattubadi, the *Zamindar* is not entitled to have it subdivided with the burden of the proportionate part of the peishcush for it is an implied term of the grant that the grantee shall not be liable to any burden other than the kattubadi imposed (See Miller and Munro JJ in A. S. 141 of 1905, 20 M. L. J. N. R. C. 32).

NOTES OF INDIAN CASES.

Lala Soni Ram v. Kanhaiya Lal.—I.L.R. 35 A 227 P.C. 25 M.L.J. 131. The decision of their Lordships in this case requires to be carefully studied as it is easy to make mistakes as to the points decided and take it to lay down considerably more than it actually does. The principal point was as to the effect of a limited owner's acknowledgment, whether the acknowledgment by the widow (and the daughter) of the mortgagee in the circumstances of the case saved the mortgagor's suit from the bar of limitation.

The acknowledgment was contained in a deed of sale of the property in question which was found to be not binding on the reversioners. Upon these facts, their Lordships held that the acknowledgment did not bind the reversioner. Their Lordships' judgment proceeds on the ground that neither the widow nor the daughter was a person from whom the reversioners derived the liability to be redeemed, the original mortgagee being the male owner. Whether in a proper case, acknowledgment by the limited owner may not save the bar of limitation as one " by an agent authorised in that behalf " or whether there may not be cases where it may properly be said that the reversioner derives liability from the widow their Lordships did not and had not to consider. If the acknowledgment was for the benefit of the estate, so far as one can judge from what their Lordships say at the top of page 235 their inclination seems to be to hold that it would bind. The Madras High Court as well as the other courts have construed the words "agent authorised in that behalf" in S. 19 so as to include managers of Hindu families, guardians, and others in charge of a person's estate. This view has had legislative sanction in S. 21 of the new Act. To extend the words so as to cover the widow's case also, would require no more violent strain on the language used. This would seem to be specially necessary in the case of husband's debts where the widow has larger powers than even the managing member. On the facts of the principal case, their Lordships having held that acknowledgment did not confer title, it was not possible to hold that the reversioner derived liability from the widow. But if we take cases in which the widow herself makes an investment of the husband's money or incurs liability on behalf of the husband's estate, there is no reason why the reversioner should not be bound as a person deriving liability from the widow. It is possible perhaps to distinguish the case of debts as one of subrogation to the widow's right of resort to the husband's estate which might be taken to continue till the debt is extinguished, though that is not the ground on which the reversioner's liability has been generally put. But in the case of rights acquired by her, we cannot help adopting the one or the other theory, the theory of agency or the theory that the reversioner is a representative of the widow. We have precedent for the latter view in the Sivaganga case, [1] *Musala Reddi* v. *Ramaya* [2]

1. 9. M. I. A. 539, 604. 2. (1899) I. L. R. 23 M 125.

Premmoyi Choudhrani v. *Preonath Dhen* [1], *Mahadeo Singh* v. *Sheo Karan Singh* [2].

Whether a difference should be made between acknowledgments made directly for the benefit of the estate and where the acknowledgment is made in a deed executed for the benefit of the estate of which it forms a natural part, is a subtlety which we need not pursue. On the whole, we should think that the Privy Council decision is not an authority for the broad proposition that a widow's acknowledgment will under no circumstances bind the reversioner.

One or two other points on which their Lordships have given decision also require to be noted. One is as to suspension of the bar of limitation by reason of fusion of interests. Their Lordships negative the possibility of any such theory of suspension that being against S 9. Their Lordships do not, of course, decide whether in a case of fusion which subsequently for one reason or other disappears, there may not be a revival. Their Lordships seem to be clear that if there is a revival, art 120 will apply to the case. Their Lordships are also clear that in the particular case, there was no fusion. Whether there would not be fusion in a case where the widow's alienation is partly valid; or where the right in question forms part of the consideration for a sale which is ultimately set aside as not being wholly binding has not been considered by their Lordships. That there can be revival in a proper case, apart from questions of equity in suits brought for possession of the estate from the alienee from the widow where the court can give relief, irrespective of limitation, is clear from their Lordships' decision in 12 M I A 244. There might be difficulty in stating when exactly the revival will take place. In the absence of a right to account or restitution, or of a legal or equitable right of refund, such a revival one should fancy, would not be upheld.

Another point of interest is that about the application of the Limitation act of 1877. Their Lordships have finally decided that on the question of acknowledgment, the governing statute is the statute at the time of the institution of the suit or proceeding. But this does not mean that the old Limitation Act will never be applicable. In cases where well known rules of interpretation preclude the application of the new Act the old Act will apply. See *Ramakrishna Chetty* v. *Subbaraya Aiyar* [3].

1. (1896) I. L. R. 23 C 636 2. (1918) I. L. R. 35 A. 481.
3. (1912) 24 M. L. J. 54.

Kasturi v. Chiranjilal.—I. L. R. 35 A 265.—In this case, their lordships upheld the validity of the marriage of a girl of 16 arranged by her maternal relations during a temporary stay with them, without the consent of the paternal relations who were her guardians and with whom she was residing by applying the doctrine of *factum valet*. The application of this principle involves the assumption that the rule of Hindu Law violated was an unessential rule. The distinction between what is essential in marriage and what is unessential is not unnoticed by the ancient writers though it is to be regretted that they do not give a comprehensive list of the essentials. Vignaneswara in his Chapter on marriage says contrasting marriage within forbidden degrees &c. with marriages of diseased girls &c., that while in the former case, no wifehood (*Bharyatwa*) arises, in the latter the marriage is improper though good. Similarly Kulluca says speaking of Saptapadi that by it there is Bharyatwa Nishpatti *i.e.*the attaining of wifehood. Neither, of these state gift by the relations as an essential. Naturally because while Saptapadi is the source of *Bharyatwa*, gift or *pradana* is only *Swamya Karana*, the thing that gives the husband property in the wife. The text of Narada required that in default of relations, the girl should take the permission of the King (Chap. XII, *v.* 21-22) but Vijnaneswara's view is (following the text of Yajnavalkya) that she may make the choice herself. (Acharadhyaya, V. 64 and commentary thereon). The consent was unnecessary where the father was guilty of delay in marrying. By such conduct, the father forfeited his ownership of the girl (Kanyayam Swamithvath Hiyathe). Swamithwa that these ancient writers refer to whatever its significance originally, now signifies nothing more than guardianship in civil law—as Kulluca says the wife becomes after the gift dependant on the husband and the dependence is only for preventing the wife from Akarya Karana—doing things that ought not to be done. In ceremonial law, this *swamya* may be of significance for the change of Gotra. Nirnaya Sindhu is of opinion that gift is for the purpose of change of Gotra. Change of gotra in the strict ceremonial sense is not of much consequence in determining the validity of the marriage. In the case of Asura marriage the view of Vijnaneshwara is that Sapindathwa for certain ceremonial purposes is not produced by it. Nevertheless the. marriage is perfectly good. On the whole, therefore, the view that consent of relations is an unessential detail seems to be right. But

there is another aspect of the case to be considered. The joining of the specified relations in the ceremony is one thing; the necessity for the consent of the guardian is another. The latter is required because the minor is incapable of doing any valid act by herself.

Mother's case stands on a special footing and it is scarcely right to apply the rules as regards her to other and distant relations. As Hindu Law recognises defacto guardianship,it may be that marriage with the consent of a defacto guardian will be upheld in all cases in which a beneficial act by him might be upheld. Where however the person who arranges the marriage is neither the de facto nor the dejure guardian, the marriage would under the circumstances be only the act of the minor and it is submitted that the validity of the marriage would depend wholly upon the question whether marriage of the minor by herself would be valid. The Hindu law rule as to incapacity of minors to enter into transactions appears to extend only to Vyavahara. Manu Chap. VIII —163 and does not seem to extend to Achara. Even applying that rule, a girl above 16 would be perfectly competent to enter into marriage without the consent of any guardian. The fact that marriages like Paisacha are recognised seem to point to the validity of marriages being independent of fraud, minority or any other mundane circumstance. Still, as Mr. Justice Muthuswamy Aiyar says in 14 M. 316, if the marriage is wholly without authority, the Court may well regard it as a fraud upon the policy of marriage and may cancel it. One may venture the suggestion that in cases where according to Narada, a minor is like an embryo *i.e.*, till she is 8 which by the by is also the marriageable age, the act of marriage being by a person who in the eye of the law has no mental discretion ought to be held to be wholly invalid. In the analogous case of adoption, it has been held that adoption can be made only by a person who has attained mental discretion. See *Rajendra Narain* v. *Saroda Sundari*.

Ages of discretion for adoption and for marriage may be different. But 8 being the minimum age mentioned for marriage, courts may well take that as the age of discretion. After that, marriage arranged with the concurrence of the girl should be upheld unless the court finds it grossly detrimental

1. (1871) 15 W. R. 548.

to the interests of the minor. If the marriage is performed against the will of the girl, the proper view is to hold that the marriage is invalid.

Badri Prasad v. Abdul Kharim: I. L. R. 35 A. 254. With great respect, we think that this case supplies the necessary corretive to 20 A 532 (which was approved in 34 A 615). It was held in that case that a scribe signing as such may nevertheless be regarded as an attesting witness if he was present at the execution. Their Lordships point out that the rule is too broadly stated. The correct position according to their Lordships is that a person may be an attesting witness though he does not describe himself as such but that he cannot be an attesting witness unless he possesses the intention to subscribe as a witness—*the animus testandi.* Without that he might be a witness but would not be an attesting witness. In this case he had not described himself as a witness and had signed the document before the executant. From these circumstances their Lordships infer that he had no *animus testandi.* If the right conception of an attesting witness is that he should witness the execution and sign the document in token of it, (See *Sarur Jigar Begam* v. *Barda Kanta Mitter* 1) it may be that a person that signs before execution can under no circumstances be regarded as an attesting witness. Under the English law, the *animus testandi* need not appear from the document itself but may be proved aliunde *Griffiths* v. *Griffiths* L. R. 2 P. and D. 300 and there does not seem to be any good reason to apprehend that the law is different in India. Under what circumstances a scribe may be regarded as an attesting witness is elaborately considered by Benson and Sundara Aiyar JJ in 24 M. L. J. 534.

Ishwaran Pillai v. Taregan: 26 M. L. J. 127. Having regard to the judgment of the Privy Council in 34 A. 63, the conclusion arrived at in this case seems to be undoubtedly right though we confess we cannot follow much of the reasoning of his Lordship Mr. Justice Tyabji. One S. executed a mortgage in favour of the defendant and reserved a portion of the consideration money with him for being paid to the plaintiff to whom he owed a debt. It was argued that the plaintiff

1. (1910) I. L. R. 37 C. 526 at 537.

was entitled to sue as the contract between his debtor and the defendant was for his benefit and reliance was placed on *Khwaja Muhammad Khan* v. *Husaini Begam* [1] His Lordship distinguishes those cases and applies the general rule that a stranger to the contract cannot sue. On exactly similar facts *viz.*, on an application by a mortgagee to recover the mortgage money from the purchaser of the equity of redemption personally because a portion of the purchase-money had been reserved with him for payment to them ortgagee, their Lordships of the Privy Council in I.L.R. 34 A. 63, held that the mortgagee could not take advantage of the agreement to which he was not a party and that he was not entitled to proceed against the latter personally. Whether or not one can agree with his lordship's view that S. 23 of the Specific Relief Act which governs only suits for specific performance can explain the judgment of the Privy Council in I. L. R. 32 All. 410 which was in a suit for money, this case puts the matter beyond controversy. But there was another ground on which the plaintiff put his case. That was that he was entitled to sue as a *cestui que trust*. It is here that we find it difficult to follow his Lordship. His Lordship's objection to treating the case as one of trust is that there is no transfer of property and therefore there was at best only an agreement to be a trustee and not an actual trust. For this purpose we may look upon the transaction from two points of view, one from the point of view that the mortgagor is the trustee and the other that the mortgagee is the trustee. In 17 C.W.N. 1143 the case was discussed from both the standpoints and their Lordships held that there was a trust. If the mortgagor is the trustee, the chose in action *viz.*, the defendant's undertaking to the mortgagor to make the payment would be the subject-matter of the trust and the mortgagor the author of the trust. The property is definite and the document being a registered one, there would be no legal impediment to holding that a trust was validly created. Suppose for instance the defendant had undertaken to pay the mortgagor the amount and the mortgagor had declared that the amount should go to the plaintiff. There would have been no difficulty in treating it as a good case of trust. The combination of the two clauses into one cannot make any difference. Taking it from the other point of

1. (1910) I. L. R. 32 A. 410. 2. (1913) 17 C. W. N. 1143.

view, the money allocated for the purpose would be the subject-matter of the trust, the mortgagee the trustee, and the mortgagor the author of the trust. The money having been transferred to the defendant, a valid trust may be taken to be created. To hold that the money should actually be counted out and then transferred, would be, we submit, an unnecessary techincality, (cf. the judgment of Chandavarkar, J. in 35 B. 403). There might be something in the objection if the hypothecation were given in return for a covenant by the defendant to pay in future and not for money, immediately exigible and reserved with the defendant for payment to the plaintiff. Notwithstanding that there is no legal impediment to inferring a trust, a trust cannot of course be inferred unless there are other facts which justify such inference. In the case of trust for creditors, till it is communicated and accepted by the creditors the trust is only for the benefit of the debtor and can be revoked by him. All that the Calcutta case says really is that where a benefit is intended for the creditor, the court ought to infer a trust and not stand on technicalities. It is one thing to say that there will be a benefit to the creditor by the performance of the obligation; it is quite another that a benefit was intended for the creditor. *Prima facie*, when a debtor pays the debt or arranges for its payment he is not thinking of conferring a benefit on the creditor but is only trying to discharge himself from liability. Unless the creditor is a party to the arrangement or unless there are special reasons for thinking that a benefit was really intended for the creditor (this would happen when the debtor is in insolvent circumstances and wants to prefer a particular creditor) it is wrong to infer a trust. This view is supported by the conclusion in the Privy Council Case though their Lordships do not consider the question from the aspect of trust; it cannot be believed that Lord Macnaughten was unaware of it; the real reason why it was not considered must be because it was hopeless the case being one of an arrangement between the mortgagor and the purchaser with no special circumstances justifying the inference of trust.

SUMMARY OF ENGLISH CASES.

In re **Green**: **Bath** *v.* **Cannon**; (1914) 1 Ch. 134.

Will—construction—Appointment of three persons as executors—Description as "nephews"—Devise to nephews and nieces—Whether the term nephews throughout the will to be construed to include these though two, only nephews by affinity.

A testatrix appointed three persons whom she called nephews as executors and gave her property to her "nephews and nieces equally." Of the three persons appointed executors, one was her nephew and the other two were her husband's nephews. It was contended on behalf of these latter that the testatrix having used the term in an extended sense in one part of the will must be taken to have used it throughout in that sense or at any rate to have used it so as to include themselves. Mr. Justice Sargant overruled this contention and held that the only persons that could take were her own nephews and nieces.

IN RE REPUBLIC OF BOLIVIA EXPLORATION. Syndicate, Limited: (1914) 1 Ch. 139.

Diplomatic agents and Ambassadors—Privilege from suit—Waiver of privilege—Company law—Auditor—Duties of—Liability of.

Two very interesting questions arose for decision in this case. First if the privilege of diplomatic agents accredited to the crown by a foreign state can be waived; secondly as to the duties of auditors. On the first question Astbury J held that except in very special circumstances the privilege cannot be waived and even if waiver is possible, it can only be with the sanction of the Sovereign concerned or at least the Legation, provided in addition that the party said to waive is shown to be aware of the privilege. His Lordship held that knowledge of Statute and Common law cannot be imputed to a foreign subject residing as a diplomatic agent of a foreign State and ought to be proved before any question of waiver could arise. On the other question, his Lordship held following the earlier cases that the auditor's duty was not merely to see to the arithmetical accuracy of the accounts but that he had a duty to satisfy himself as to their substantial accuracy. He had not only to call for vouchers but also to satisfy himself with reference to the articles of association that the alleged payments were not illegal. He was not bound to be suspicious but he had to proceed with reasonable caution. If the audited balance sheets do not show the true financial condition of the company and damage has resulted it is on the auditors to show that this was not the result of any breach of duty on their part. In this case, the auditors were sought to be made liable for three items. First a sum paid as commission for obtaining subscription for shares, second profit costs allowed to a solicitor director for

incorporation; third some amount shown as paid for the purchase of stores. As regards the first, a question was raised before the share holder's meeting as to the legality of the payment and it was approved. As regards the second, the Solicitor who was paid the profit costs was not a director at the time of the incorporation and the sum was entered as payable having been agreed though passed at a time when the solicitor who was paid was a director. As regards the third, there were no special circumstances raising suspicion. Under these circumstances, his Lordship held that the auditors were not liable.

Goldfort *v.* **Welsh**: (1914) 1 Ch. 213.

Lease—Construction—Demise of room—includes " outer wall "—Parol evidence—Admissibility of.

In this case, A demise " of the rooms of a business premises " was held *prima facie* to include the external walls. It was also held that parol evidence was not admissible to prove that there was no intention to demise the external walls.

In re Marshall; Marshall *v.* **Marshall**; (1914) 1 Ch. 92.

Trustee for sale—Power to postpone sale—Uncontrolled discretion—Persons absolutely entitled to beneficiary interest—Right to their interest transferred—Real property and personal property—Difference between.

Power to postpone sale conferred on trustees for sale is conferred on them for the benefit of the cesfui que trust and when the interests of the beneficiaries, as a whole does not require either the sale or the postponement of distribution it is open to any of the beneficiaries absolutely entitled, to call upon the trustees, to convey their shares to them and the fact that the trustees are given an uncontrolled discretion in the matter is no answer to such a demand. In the case of real estate, however, there is a presumption that a compliance with the demand for the delivery of an undivided share is likely to prejudice the estate. There is no such presumption as to personal property generally (mortgages being excepted).

Oram *v.* **Hunt**: (1914) 1 Ch. 198.

Common interest—Trade unions—action for slander by way of office, by officer—Indemnity for costs—Ultra vires.

A common cause is not a common interest. The fact that a trade union officer is slandered by way of his office and the trade union is adversely affected by the slander does not give it a common interest in law in the action by the officer for damages. It was accordingly held in this case that the corporation in giving an indemnity to the officer before the action was instituted for the costs of the action was guilty of a tortious act and payments made in pursuance of such indemnity were illegal and could not bind the union. It was also held that the maintaining of such actions was not within the powers of the trade union express or implied.

Mash v. Darley (1914) I K. B. 1.

Evidence—corroboration—Conviction under Bastardy Act—Proof

In a proceeding under s.4 of the Bastardy Law's Amendment Act, the evidence of a police officer who proved that he was present at the trial and the conviction of the accused, was admitted as corroboration of the evidence of the complainant. *Held* that the conviction was presumptive proof of the comminsion of the crime. *In re* Crippen [1] followed. Where it is not necessary to prove conviction, but evidence of a conviction is offered by the complainant as part of the evidence in support of the case, the evidence of a person who was present is sufficient. The evidence is also admissible as evidence of the opinion of the jury expressed in the presence of the accused.

Holmes v. Pipers Limited (1914) I. K. B. 57.

Merchandise Marks Act—False Trade Description.

Some persons sold under the name of " Fine British Teragona wine " what was really a mixture of a wine made and prepared in England from dried raisin and a small quantity of mistella, a kind of wine made and used for blending purposes and not suitable for consumption. *Held* that they were guilty of the offence of giving a false trade description under S. 3 of the Merchandise Marks Act (50 and 51 Vict Ch. 28.)

Rex v. Simpson 1914 I. K. B. 66.

Certiorari—Acquittal—Maxim "Nemo debet bis vexari pro et eadem causa" —Judge disqualified by statute—Coal Mines Act.

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1. (1911) P. 108

Two persons were charged with an offence under the Coal Mines Act. They were tried by two Magistrates as a court of summary jurisdiction, and acquitted. One of the Magistrates was a person employed in the Mine and under s. 103 he could not have acted as a justice unless with the consent of both parties. This fact was not known to the prosecutor at the time. *Held* on an application for a certiorari to quash the order of acquittal that the maxim nemo debet bis vexari applied and certiorari, ought not to be granted.

Rex *v.* **Tho Governor of Brixton Prison : Exparte Servini** 1914 I. K. B. 77.

Extradition—Order in Council—Omission to prove—Habeas corpus, Extradition Act, 1870 (33 *and* 34 *Vict. Ch.* 52).

A Magistrate committed a fugitive criminal to prison with a view to his extradition to Italy. The order in council applying the Extradition Act to Italy was not formally proved before the Magistrate he being aware of its existence. A rule nisi for a writ of Habeus corpus was issued on the ground that the Magistrate had no jurisdiction to commit without proof of the order in Council *Held,* discharging the rule that the pure omission to prove formally the order in Council does not entitle the prisoner to be released though it is generally important that the order in council should be proved.

Royal College of Veterinary Surgeons *v.* **Kannard** 1914 **I. K. B.** 92.

Veterinary Surgeon— Use or description by an unqualified person—canine surgery—Veterinary Surgeon's Act—45 and 46 Vict. Ch, 62) 1871.

By the Veterinary Surgeons Act, S. 17 (1) any person who not possessing the prescribed qualification takes or uses the title of Veterinary Surgeon or practitioner or states that he is specially qualified to practice the same shall be liable to a fine. An unqualified person placed over his door a plate bearing the words '*canine surgery.*' *Held* that the words did not amount to a statement or description that he was specially qualified to practice the same and therefore he was not liable to fine.

Nicholls v. **Evans** 1914 I. K. B. 118.

Gaming—Cheque for racing debts—Payee paid cheque into bank—Action against payee for money—Whether payee holder and Bank endorsee.

Sec. 2 of the Gaming Act provides that in case any person shall make draw give or execute any note bill or mortgage for any consideration on account of which the same is by hereinbefore acts declared to be void and such person actually pay to any indorsee holder or assignee of such note bill etc., the amount of money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note bill or mortgage was originally given upon such illegal consideration as aforesaid and shall be deemed and taken to be a debt due and owing from such last mentioned person and shall be recoverable from such person by action at law. The plaintiff in payment of certain gaming debts gave some crossed cheques to the defendant who indorsed the same and paid into his bank.

The plaintiff then sued to recover the amounts, under s. 2 of the Gaming Acts.

Held that the defendant was not a holder within the meaning of s. 2 of the Act, and that as the bank merely collected the amount for the defendant it was not an indorsee.

Quaere whether plaintiff could have recovered the amount if defendant had paid the cheques to his bankers in the character of holder in their own right and not in the character of agents for collection.

I*n re* **the Vexatious Actions Act** 1896 I*n re* **Boaler** 1914 I. K. B. 122.

By s. 1 of the Vexatious Actions Act it shall be lawful for the Attorney General to apply to the High Court for an order if he satisfies the court that any person has habitually and persistently instituted vexatious legal proceedings, whether in the High Court or in any court and that no legal proceedings shall be instituted by that person in the High Court or any other court unless he obtains the leave of the High Court and satisfies that the legal proceeding is not an abuse of the process of the court. On the motion of the Attorney-General a Division court ordered that no legal proceedings should be instituted by B, unless

he obtained the leave of the court. *Held* that "legal proceedings" in the section do not include criminal proceedings and that the order was no bar to an application to a Magistrate for a summons or to the presentment of an indictment to a grand jury in respect of misdemeanours. Darling, and Lush JJ. (Bankes J. dissenting.)

Rex *v.* **Lowden** 1914 I, **K. B.** 144

Stamps—Sale of forged stamps—Cancelled before sale—whether offence.

S. 13 of the Stamp Duties Management Act 1891 enacts that "any person who knowingly sells or exposes for sale or utters or uses a forged stamp shall be guilty of felony." A person who sells a forged stamp commits an offence notwithstanding that the stamp may have been cancelled before sale.

In interpreting a statute we must consider that the Parliament intended the words used to mean what they appear to mean and so a stamp even though cancelled does not cease to be a stamp under the Act.

Furtado *v.* **City of London Brewery Co.** (1914) I. K. B. 152.

Interpretation—Provision Ex Majore cautela—Effect of on another provision in itself clear—Appeal, what is—Income tax assessment —Application for relief to Commissioners.

" A provision put in possibily ex majore cautela in one clause of an act cannot have the effect of changing the interpretation to be put on the language of another clause if the language of the latter is clear " Scrutton J.

An appeal implies that the decision appealed against is wrong. An application to the Commissioner of Income tax on the assessment of profits made for income tax purposes, for relief on the ground of loss of profits for the year is not an appeal on the assessment and so no case can be stated by the Commissioners.

In the Estate of Hall: Hall *v.* **Knight and Baxter. 1914 P. 1.**

Will—Legatee convicted of manslaughter of testator—Forfeiture of right—Public policy.

The rule that a person who is guilty of the murder of another person cannot take any benefit under that person's will is based upon public policy and forms part of the common law of the land. The rule applies equally to a case of manslaughter. A legatee who had been convicted of the manslaughter of her testator is not entitled to apply for probate of the will.

JOTTING AND CUTTINGS.

The New City Judge—Mr. Atherley Jones has, in accordance with expectation, been appointed to succeed Judge Lumley Smith as a Judge of the City of London Court. It is an appointment which will be generally regarded as a fitting one. Mr. Atherly Jones, though he has been an active member of the House of Commons for more than twenty-five years, has always preserved his independence of judgment; he has never belonged to the ranks of the politicians who 'always voted at their party's call, And never thought of thinking for themselves at all.' He has, moreover, displayed a special interest in branches of the law which he will frequently have to deal with at the City of London Court. He is the author of well-known works on international law and commerce in war; while his experience as Recorder of Newcastle will be of much service to him in the administration of justice at the Old Bailey *Law Journal.*

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The Final Source of British Justice.—Whatever the legitimate desires of the self-governing dominions for restricting the right of the appeal to the King in Council, there can be no doubt that the power of the King to grant of his grace a special leave to appeal to himself from a criminal judgment of any court in the Empire is one of the great pillars of British justice. Six months ago the Judicial Committee quashed a conviction for murder which had been upheld by a High Court in India, and prevented a very grave miscarriage of justice (*Vaithinatha Pillai* v. *The King Emperor*), and more recently it has been called upon to quash a criminal judgment which was passed in circumstances that offend against the first principles of our law, and which, if left undisturbed, would have done grievous wrong. The appeal (*Lanier* v. *The King*) was brought from a judgment of the Supreme Court of the Seychelles, which had convicted the appellant of the embezzlement of moneys entrusted to him as guardian of a minor,

and sentenced him to eighteen months' imprisonment. An appeal lies from the Court to the Supreme Court of Mauritius in a criminal case where the penalty imposed is of two years' imprisonment or more, but as the Judge had refused to increase the sentence so as to make it appealable, the only means of relief open to the convicted man was the King's grace. It is only in extreme cases, where the principles of natural justice appear to be infringed that the Privy Council will interfere with a penal judgment, but here the Board was so impressed with the wrong which had been done that they gave the appellant costs against the Crown, following the precedent laid down in the case of *In re Johnson* (1900), where it was held that the Crown should be treated as any other litigant in regard to costs of appeals. The appellant had, it is true, mixed trust moneys with his own business capital, but when called upon by the family council of the insured to adjust the accounts he had straightway done so. His conduct at most justified only civil proceedings, and yet he was subsequently prosecuted at the instance of the acting chief Judge of the colony, who, though he had been president of the family council, yet tried the case and passed the sentence. There was an additional circumstance of oppression in the case in that the Judge refused to adjourn the trial so that the accused might be assisted by counsel. The whole conduct of the prosecutor, indeed, was opposed to the spirit of British justice; and the powers of the King to secure fully for his individual subjects, however remote from the centre of the realm, the application of that spirit is one of the blessings of British citizenship.—*Ibid.*

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Indemnification of Bail.—An agreement to indemnify any person for giving bail on behalf of another is, of course, under English Law an indictable offence (*Rex* v. *Porter* (1910) 1 K.B. 369).—*Ibid.*

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Treasure Trove and Legal Aid:—During the last few months there have been two discoveries of buried treasure, and in one of the cases, as no claimant at the coroner's inquest which was held upon the find could successfully establish his title, the royal prerogative was enforced. The treasure, which was found by a workman near St. Helens, consisted of gold coin of recent date,

and several persons who had suffered from robberies presented themselves to urge their claims to it, but they failed to prove the identity of the hoard with their loss. And where there is no certain owner the King is deemed to have the property in anything found in the realm. In the other case, where the find was of a quantity of silver plate near Cardiff, a rightful owner did appear, who proved that the articles had been stolen from a mansion in the neighbourhood. In most foreign legal systems treasure-trove is divided between the owner of the land on which it is found and the finder; but in England the ancient royal prerogative has been preserved intact, though the proceeds of it no longer go to swell the private wealth of the sovereign, but fall into the Consolidated Fund of the national Exchequer. The most important elements of the *bonavacantia* which are thus appropriated by the State are the unclaimed estates of intestates leaving no known next of kin. These windfalls amount annually to a considerable sum, which would more than suffice to cover the cost of a State-aided system of legal aid for the poor. It is one of the most striking prerogatives of the King that he is *pater patriae* the general protector of his subjects and the guardian of charity, and it would be fitting that the prerogative over ownerless property in the Kingdom should be employed to extend the exercise of the prerogative of assisting the poor. Several continental countries, as well as New Zealand and some of the States of the United States, have made the legal assistance of the needy litigant a charge on the Treasury; and if the law is to be, in application as well as in substance, equal, it is fitting that a similar step should be taken in England. The ear-marking for this specific purpose of a sufficient portion of the unexpected accession of wealth which falls to the Crown would not impose any burden on the national revenue, and would do much to increase the general contentment in the administration of Justice.—*Ibid.*

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Miscellany:—Though all the Chief Justices of modern times, with the exception of Sir Alexander Cockburn, have been Peers, Sir Rufus Isaacs (says the *Globe*) enjoys the distinction of being the first, Chief' for eight years to be raised to the House of Lords during his tenure of office. Not since Denman was made a Peer in 1834 has a Lord Chief Justice been ennobled. All Denman's noble and learned successors were raised to the Peerage

in an earlier stage of judicial existence. The custom of Chief Justices being members of the Peerage did not become really settled until Lord Mansfield's day. His two immediate predecessors—Sir William Lee, who began to preside over the King's Bench in 1737, and Sir Dudley Ryder, who was appointed in 1754—were never raised to the House of Lords. The notorious Jeffreys, indeed, was the first Chief Justice to be made a Peer during his occupancy of the office.—*Ibid.*

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A New Law Lord:—The supreme appellate tribunal, to which two additional Lords of Appeal in Ordinary were recently appointed, is to be further strengthened by the voluntary services of Lord Parmoor. The qualities which enabled Sir Alfred Cripps—it is still difficult to write of him without using his old name—to gain so distinguished a place at the Bar should enable him to render the Empire the most valuable service as a Law Lord. A member of the Judicial Committee of the Privy Council is the occupant of a 'high judicial position' within the meaning of the Appellate Jurisdiction Act, 1876, and Lord Parmoor will, it is to be presumed, acquire his eligibility to take part in the judicial work of the House of Lords by being appointed to one of the unpaid positions on the Judicial Committee. Lord Haldane, in announcing Lord Parmoor's public-spirited desire to sit as a Law Lord, stated that the Imperial Court of Appeal would have, with the accession of Lord Parmoor, a dozen members accustomed to sit in both its divisions. It has become, indeed, a remarkably strong Court. In addition to the six Lords of Appeal in Ordinary—Lord Atkinson, Lord Shaw, Lord Moulton, Lord Parker, Lord Dunedin, and Lord Sumner—there are the Lord Chancellor, Lord Halsbury, Lord Loreburn, Lord Mersey, Lord Kinnear, and Lord Parmoor. There are several other peers who are competent to sit. Lord de Villiers has occasionally done so, and Lord Alverstone will, it is sincerely hoped, so regain his strength that he will enable the country to enjoy the benefit of his large store of legal knowledge and experience in the highest court of the realm.—*Ibid.*.

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The Judicial Committee:—The Lord Chancellor and Lord Dunedin were the guests at a dinner held by the Society of Writers to His Majesty's Signet in Edinburgh on January 13.

The Duke of Montrose (Keeper of the Signet), in proposing the toast of 'The Guests,' said that the occasion was unique, because one of the guests they desired to honour was the first son of a Writer to the Signet who had reached the high position of Lord Chancellor, while Lord Dunedin's father was also a well-known and distinguished Writer to the Signet.

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Lord Haldane said his life had been a somewhat miscellaneous one. He had been a War Minister, he had been a Gifford Lecturer, he had been despatched on delicate diplomatic missions over which the curtain must be drawn, and, finally, had returned to his own business of the law, and one of the pleasures he had experienced was that a wish which he had from the beginning when he received the Great Seal had been fulfilled; he had had a covetous eye on Lord Dunedin, the President of the Court of Session in Scotland, and he never rested until he persuaded the Prime Minister to persuade Lord Dunedin to join the supreme tribunal. It was a great tribunal which sat substantially in two divisions in London, administering justice for the entire Empire, and when he looked back there was something comforting to think of the difference in numbers and in strength between a year ago and to-day. It had always been one of his ambitions to have something to do with making that tribunal the greatest that the world had ever seen, and he was not sure that it was not that already. But there was still more to be done. The work was unending with an Empire like ours. A year ago they were so short of numbers that they could barely man two courts of three each at the same time for the service of the House of Lords. They had got an Act through last session, however, which had raised the number of Law Lords from four to six. There was now a further accession in that great lawyer, Sir Alfred Cripps, who, with the utmost public spirit, no longer desired to add to his fortune at the Bar, but had expressed the wish to devote himself to judicial work, and was now about to join them in the supreme tribunal of the Empire. That accession gave them twelve Law Lords. They had got the substance that they had long been denied for the supreme tribunal, and they could man without difficulty two great courts of five members each, which to his mind was the perfect number. The Empire was held together by three links,

the Crown, defence, and the administration of justice. If a change in the Second Chamber were made in any form which he new nothing of, whether in the shape of Lord Lansdowne's Bill or in the shape of those nebulous ideas of which he knew very little, it would be extremely difficult to retain the appeal to the House of Lords in the form in which it existed at the present time. The thread of tradition and of the Constitution would be gone, and the appeal would have to be to the King, not to the King in Parliament, but to the King properly and constitutionally advised. The advantage of the present situation was that, with the size and strength to which the Imperial tribunal has now reached, it would be the merest change of form whatever happened. Whether anything happened or not, it did not very much matter from the point of view of substance, but if it did happen it would happen without much difficulty. Just as hitherto the appeals had lain to the King either in Parliament or in Council, so it would be natural that the appeals should in future be to the Sovereign in Council. With regard to the Dominions Overseas it might be enacted in a short Bill that the Judicial Committee of the Privy Council might sit in more than one division; that the present Judges of the House of Lords would sit in one division and the Judges and Privy Council in another, and it would be theoretically possible for a division to be organised to sit, if necessity so demanded, in some distant Dominion of the Empire. But he had never thought for a moment that they could have the supreme tribunal of the Empire anywhere else than in the Metropolis of the Empire. At the same time it was right in principle that he should emphasise that the supreme tribunal was not local but Imperial; that, like the person of the Sovereign, it was everywhere throughout the Empire; and in theory, at all events, that great body might be able to go in a division specially constituted to determine a dispute concerning a boundary or something requiring local knowledge. There, it seemed to him, they had the natural evolution of their unwritten constitution, and an evolution which might take place without difficulty.—Ibid.

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Refusal to Plead.—It is not very often nowadays that a prisoner 'stands mute,' *i.e.*, refuses to plead on arraignment to the indictment against him. A case of this kind, however, occurred

on Tuesday at the Old Bailey (*Rex* v. *James Doran*). Doran was indicted before the Recorder on a charge of forging and uttering a letter requesting a bank to pay him the sum of 220*l*. When he was called upon to plead his counsel stated that he had advised the prisoner not to plead upon the indictment in order that he might be in a position to take before the Court of Criminal Appeal a technical objection under the Criminal Procedure Act, 1851, relating to the postponement of trials from one session to another. The precise nature of the point desired to be taken was not sufficiently indicated for comment here, but no doubt will be argued fully upon the appeal. Counsel's reason for advising refusal to plead, however, was possibly based on a consideration of the now celebrated case of *Rex* v. *Banks* ([1911] 2 K.B. 1095), commonly known at the Criminal Bar as 'the *Autrefois Acquit* case'. There a prisoner, after pleading not guilty to an indictment for manslaughter, added a plea of *autrefois acquit* —namely, that a coroner's inquisition against him for murder of the same person had been dismissed by the jury, the prosecution offering no evidence upon it. After three sittings to consider the difficulties presented by this point, the Court of Criminal Appeal held that, once a plea of not guilty is entered, special pleas in bar cannot be taken so long as the first plea remains on the record. In other words, the prisoner must elect between his special plea and the plea of not guilty—he cannot take both. We presume that it was in order to avoid some difficulty of this kind that counsel in *Doran's Case* advised his client to 'stand mute.' Once upon a time, of course, such conduct was common. Prisoners liable to forfeiture of property on conviction preferred to save their goods and chattels for their families by refusing to plead, They were then put to the '*peine forte et pure*,' *i.e.*, pressed to death unless they consented to plead. The barbarous practice was abolished in 1772 (12 Geo. III., cap. 20), and by a later statute (7 & 8 Geo. IV., cap. 28) the Court is directed to enter a plea of, 'not guilty' if the prisoner is mute 'of malice,' and not 'by the visitation of God.' This course the Recorder followed in *Doran's Case*. Ibid.

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A Tribute to the Attorney-General.—Sir Edward Clarke, K.C., said he had very special reasons for satisfaction in the fact that he was permitted at that meeting of the Bar to move a vote of

thanks which he had very frequently moved to the Attorney-General who had presided over these meetings. The Attorney-General who presided to-day was one with regard to whose career and whose present position the Bar of England might feel a proud satisfaction. He had come very early to his high position. His years at the Bar had not been long as measured by those of some who were present at that meeting, but he had come to his great position with the unanimous approval of the whole profession. No man ever accepted that office who was more competent to fulfil its duties or who gave greater promise to the profession and the public of being a worthy servant of the community. His memory of the House of Commons, from different points of view, went back 50 years, and he looked back to the time when from the gallery of the House of Commons he heard the duels between Sir Hugh Cairns and Sir Roundell Palmer. In his belief, there had not been a time in all this period when the two front benches of the House of Commons had been more brilliantly represented by members of the Bar than they were at this moment. He had entire confidence in the great services that the Attorney-General would render. He only hoped he would not work too hard, so as to prematurely age that charming personality in which all his friends delighted. With that expression of a desire, which he trusted the Attorney-General would remember as a hint, he asked his brethren of the Bar to join in thanking him for his attendance there that day.

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Mr. Boydell Houghton, who seconded the motion, said they were always pleased to have the Attorney-General presiding over their annual meetings, but they were specially pleased to have the new Attorney-General there that day, because, as Sir Edward Clarke had said, they were all proud of him and rejoiced in his brilliant and successful career at the Bar.

The motion was carried with acclamation.

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The Attorney-General, in reply, said he thanked his old friends Sir Edward Clarke and Mr. Boydell Houghton very heartily for the too kind things they had been good enough to say, and he thanked the meeting very sincerely for the generous warmth with which they had accepted their proposition. He knew that the Bar of England was the most generous profession in the world.

The Resignation of Mr. Justice Bucknill.—Mr. Justice Bucknill, who proposed to resign at the close of the Michælmas Sittings, when he completed fifteen years of judicial service, but who postponed his resignation with the object of facilitating the removal of the arrears in the Court of Appeal, has been compelled by ill-health to fulfil his original intention of not returning to the Courts. His retirement will be sincerely regretted by the members of both branches of the profession. He has been a very human judge. It is not by any special qualities of legal learning that Mr. Justice Bucknill has gained the high regard in which he is universally held. Probably he would have made a deeper mark as a judge in the Probate, Divorce and Admiralty Division, where he practised before he was promoted to the Bench, and where he has not infrequently sat when help from the King's Bench staff has been required. It is by the conspicuous gifts he has displayed as a *Nisi Prius* judge—his keen sense of fairness, his painstaking industry, his judicial good humour, his breeziness of temperament—that he has won the wide popularity he enjoys. The man has never been lost in the judge, nor, let it be added—for he has never been lacking in dignity—has the judge been lost in the man. We trust that, quickly regaining his strength, he will long continue to enjoy those country pursuits of which there has always been an agreeable suggestion in his judicial bearing. Ibid.

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British Law and Colonial Agitators.—The South African Government is cheerfully engaged in raising as many as possible of the yet undecided points in constitutional law, and to the jurist many fascinating problems arise out of its latest action. The deportation of ten Labour leaders, without trial under martial law or under the ordinary law of the country, actually carried out by decree of the Executive while a judge had cognizance of this proposed illegal step, is certainly a very grave infringement both of constitutional law and of the respect due to Civil Courts. But, so far as the South African Government is directly concerned, no doubt a local Act of Indemnity passed by the Union Parliament at the Cape will relieve them of all liability. But how stands it with the owners and master of the good ship *Umgeni*, which took the exiles on board and is carrying them on a journey to London ? This acceptance of the agitators on

board against their will is an assault and false imprisonment; as such it is both a tort and a crime. The *Umgeni* is a vessel of the Natal Line and flies the English flag; in other words, she is British territory and, as was decided in *Davidson* v. *Hill* only a few years ago (1901), the English courts have jurisdiction to try all torts committed on board such a ship. If, then, the master and his owners are sued in England, have they any answer? A local Act of Indemnity cannot protect the master except so far as his illegal actions took place in a South African port or within the territorial waters—*i. e.*, three miles off the South African shores; for on the high seas the Union Parliament has no jurisdiction. But the false imprisonment is a continuing tort; it is not completed with the first act of assault, but with the final act of detention preceding release. Hence a tort has been committed on the high seas, and so is outside any Act of Indemnity of the Cape Legislature. Again, can the master of the ship plead duress—that his hand was forced by the South African Government? Duress is a question of fact, and, according to the *Times*, there is reason to believe that the ship was specially chartered to the Cape Government by its Natal agents for this service—in which case any plea of duress is beside the question. But even in the absence of such an agreement, and even if the master acted under pressure, such conduct as is suggested on the part of the South African Executive seems scarcely 'duress' sufficient to excuse a tort or a crime. The whole situation promises a series of interesting problems in practical jurisprudence for the edification of our Courts. Ibid.

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Conscientious objections by Jurymen.—To what extent ought courts of law to exempt a juryman from service because of a 'conscientious objection' on his part to some element in our criminal law? No such ground of exemption, of course, can be legally claimed; but where a *bona fide* objection of this kind exists it is rather unsatisfactory to retain a juryman against his will on the panel. In the murder trial of *Rex* v. *Ball and Eltoft*, which has taken place at Liverpool, Mr. Justice Atkin released from the jury one of its members who satisfied him that he had a conscientious objection to capital punishment. Some years ago Mr. Justice Kennedy, as he then was adopted a similar

course at the Old Bailey, and in one of the militant suffragette prosecutions Lord Coleridge excused a juror who explained that he could not conscientiously condemn the actions of those ladies. Public opinion, no doubt, would approve of exemption in such cases, but the difficulty is to know where to stop. A juryman who believes that the law requires amendment in some detail can scarcely be excused from service in any case involving that reform merely because of his views. Happily, in practice jurymen are usually people of sound common sense, who hold normal views, and therefore the 'conscientious objector' is not often seen in the jury-box. *Ibid.*

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Contempt of Court.—Great uncertainty has long prevailed as to the precise limits of the offence known as contempt of court when committed by the publication in the press of matter affecting the trial of a pending action. It is generally agreed that the publication of comments which tend to prejudice the fair trial of any action is a serious contempt, but three points remain in great doubt. First, as to what trials the principle extends. Criminal trials, of course, are protected; so are civil trials by jury whether in the King's Bench or the Probate Division of the High Court; but how far comment is forbidden upon pending litigation in Chancery or before a judge, unassisted by a jury, in other Divisions, is still not a settled point. On an application last Tuesday in the case of *Leslie-Melville* v. *Leslie-Melville, Platt and Fitzwilliam,* a pending divorce trial, Mr. Justice Horridge (sitting as an additional judge of the Probate, Divorce and Admiralty Division) applied this principle to a cause entered in the special jury list of the Divorce Court. Secondly, to what extent is the publication of collateral matter about a party to a pending action, without direct reference to the subject matter of the litigation, a contempt? In the case in question a society newspaper published a 'smart paragraph' about a peer well known to be the co-respondent in the pending divorce suit, and gave a picturesque account of his career certainly calculated to impress any juryman who happened to read the article with an unfavourable view of that nobleman's moral standard. Mr. Justice Horridge held that such an article, being undoubtedly calculated to prejudice the fair trial of the case, amounted to a serious interference with the course of justice, and was a

contempt. Again, it is well settled that in cases of this kind there must be a serious, and not merely a technical, interference with justice before the Court will intervene and treat such interference as a contempt (per Lord Justice Collins in ***Hunt*** v. *Clarke*, 58 L.J., Q.B. 490). The liberty of the Press would be unduly fettered if frivolous applications were encouraged in merely nominal contempts. But it is not always easy to say what is a serious interference with the course of justice. In the present case the co-respondent held a high station in society, so that comments upon his pending case would naturally be widely read by the public at large, including possible jurymen. And Mr. Justice Horridge, taking a most serious view of the contempt, committed the director of the paper, whom he regarded as personally responsible for thearticle, to prison ***sine die***, until he should satisfy the Court that he had purged his contempt Ibid.

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Judicially determined.—A South Dakota correspondent sends us the following:

" It was in a Black Hills court. Time, frontier days, Case, *State of South Dakota* v. *Peter Larson.* Charge, grand larceny, of the 'doctered-brand' variety.

" All day long the prosecuting attorney, who was something of an old legal fossil, had, like the football hero, 'wandered round the end,' but had never quite managed to strike the centre of his case. The defendant's attorneys were alert and taking every possible advantage of the missteps of the prosecution. The Court, with ill-concealed disgust at the lambering method, or lack of method, on the part of the prosecutor, had from time to time taken a hand in the state's case. This course, instead of gaining the gratitude of the state's attorney, aroused his ire. Finally the Court assisted in framing a question directed at a witness, so as to forestall an objection from the defence.

" The Court must think that I don't know to examine this witness ," blurted out the prosecutor.

" The Court thinks the prosecuting attorney is not only ignorant but also egotistical," snapped the judge.

" Is that a—a judicial determination of the Court ? " stammered the old prosecutor, somewhat taken aback.

"If the matter was properly before this Court, it would certainly so hold. Proceed with the case."

The Green Bag.

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Father and Judge—Hon. "Ollie" James, the giant Senator from Kentucky, told this story of a Kentuckian holding the office of trial justice in that state.

His own son was once brought before him on a charge of drunkenness and disorderly conduct. His Honor listened gravely to the evidence, which established a clear case against the young man, and said:

"The Court will now render sentence. You're fined one cent and costs. The Court will remit the costs, and you may go home and thank God that your father is the judge."—*Ibid.*

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Lawyer—The cross-examination did not seem to worry you. Have you had any previous experience?"

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Client—"Six childern" *Kansas City Star.*

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Counsel for the Defence (to client who has been dozing during the verdict)—"Wake up and get out. You're acquitted!"

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Accused—"Lor' lumme. Wot! not guilty?"

"*The Green Bag.*"

CONTEMPORARY LEGAL LITERATURE.

In the January number of the *Journal of the Society for comparative legislation* Professor Lee tells us how in British Guiana the Roman Dutch Law has been gradually superseded by the English law Mr. Charles Reis tells the same story about Spanish Law in Trinidad. It may interest the Indians to know that the Law in the latter country has owing to the introduction of immigrant labourers from India been to a certain extent influenced by the Indian Law, certain portions of which has been incorporated into the law of that colony.

The usual review of the legislation during the year 1912 also appears in this issue. *Egypt* seems to have had the largest legislative activity during the year. The statutes and decrees of the year

include provisions dealing with the administration of justice the condition of peasant proprietors and the preservation of antiquities. By an amendment of the Penal Code any person condemned to a term of imprisonment not exceeding 3 months is given the option of serving his sentence outside the wall of the prison. By another provision, usury is made an offence. A new article in the Civil Procedure enables the Government to resort to arbitration when questions arise on contracts for public works. Another law confers the right of interpellation on the members of the legislative Council. A comprehensine regulation has also been passed as to advocates their qualifications, recruitment etc. A *Homestead* Law exempts the holdings of small proprietors from seizure for debt. The important Legislation in *France* is that which gives putative children under certain circumstances the right to have their natural paternity declared against the father. If the claim is *mala fide*, the Court is given power to punish the claimant in addition to condemning him to pay the costs of the other side. By four international conventions, *Germany* has declared the Law as to the effects of marriage on property where there is a conflict of laws. During the year, Russia has organised a system of elected and salaried justices of the peace and has followed the lead of other European countries by making legal provision for the relief of workmen during sickness and for imposing on their employers the duty of insuring them against accidents. The feeling against Jews appears to be very strong and they are declared ineligible to serve in Peasant Courts. A reform seems also to have been introduced in the matter of women's rights of inheritance. Under the former law, a daughter where there were also one or more sons inherited only one fourteenth of the immoveable and one eighth of the moveable property left by the parents and had no right of inheritance to property left by a brother or sister if there was a brother surviving. The new law equalises the rights of sons and daughters in the first case and brothers and sisters in the second, inheritances being divided among them in equal shares except in the case of rural land of which each daughter, if there are sons each sister if there are brothers has the right only to a seventh part. *Australia* attempted an amendment of the constitution in several important respects but failed on the referendum. By the Immigration Act 1912, power is

given to establish medical bureaux at places outside the common-wealth and also to prevent people who are unhealthy from entering the Dominions. An act of New South Wales establishes an industrial court of arbitration. An amendment of extensive character is made in the Criminal Code of Western Australia by providing for preventive detention and for a Criminal Court of appeal. In certain classes of crimes *e.g.*, murder, grievous hurt, and offences against morality (rape, abduction incest etc.,)a person twice convicted, and in the case of certain other crimes stealing robbery etc., when thrice convicted, the court is given power to sentence the man to preventive detention *i.e*,, he is kept in confinement subject to less rigorous discipline than other criminals and is required to pursue some calling or other the proceeds of which will be applied towards the maintenance of himself and his dependants. The Governor may at any time allow the criminal his liberty or license but as a condition for such liberty, the criminal must place himself under the supervision of a society or person willing to take charge of him. The license may be revoked at any time by the Governor. If after being let out, the man is of good behaviour for three years, he is absolutely set free. The Act providing for criminal appeals while following closely the lines of the English Act gives the Court of appeal power to order a new trial which the English does not give. *New Zealand* has passed an Act giving power to the Supreme Court to appoint guardians to the person and property of a person who by reason of age, sickness, mental infirmity or excessive use of alcoholic liquor is unable wholly or partially to manage his affairs. ***South Africa*** has passed a comprehensive Irrigation Law which invites comparison with the system in India. A curious ordinance in ***Nysaland*** is directed against the attempt of the native to avoid payment for two huts by keeping both his wives in the same house by requiring a separate hut tax for each wife. ***Manitoba and British Columbia*** have thrown open the legal profession to women.

When does the violation of a criminal statute make the wrong-doer civilly responsible ? Professer Thayer of Harward considers this question in the *Harward Law Review for February* in an article headed "Public Wrong and Private action." He considers two kinds of statutes—statutes prohibiting action such as health laws, traffic ordinances, speed limits and other police regulations,

and statutes requiring certain affirmative action *e.g.*, imposing the duty to remove snow from walks etc. He thinks that in the case of all statutes prohibiting action, the effect of the statutes is to make their violation as a matter of law a falling off from the degree of care a reasonable man ought to take, whereas that was a matter for the consideration of the jury in each case formerly in other words—any person injured by their violation is entitled to claim damages against the wrongdoer. In the latter class of cases, he would make certain distinctions. If the duty was a common-law duty and the legislature only regulated it, the cause of action of the party would not be affected by the statutes. Then again, statutes which appear to require an affirmative act are often only prohibitive statutes. In such cases, the rule stated above will apply. Barring these two cases he thinks that it is dangerous for courts to speculate as to unexpressed legislative intent and create private remedies by implication.

Mr. Willes B. Perkins gives a history of the reform of procedure in England and America. He says that up to the time of Bentham, people hardly realised the significance of the distinction between substantive law and procedure. English lawyers thought forms of action were of equal importance with the substance of the rights. The first recognition of his principles was in America in the state of Louisiana. His attempt to simplify and rationalise procedure was opposed by the conservatism of lawyers. The opinion of the first commission in 1831 was that the existing rules of common law pleading were founded "in strong sense and closest logic " and so appeared when well understood and explained." The so-called Hilary rules of court and some partial changes in Chancery practice were all the result. In 1848, the New York Civil Code was passed and this roused the English Legislature to action. Various statutes reforming procedure were passed during the years 1852 to 1872. The first series, known as the Common Law Procedure Acts established a reformed system of pleading at law—the second series reformed equity pleading. They marked a great advance in the direction of reform. Forms of action were simplified and many fictions formerly required to be set forth in pleadings were abolished. More significant than these, many equitable defences were permitted in actions at law. These Acts were followed by many of the American States. But they fell

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NOTES OF INDIAN CASES.

Ganesha Rao v. Tulja Ram Rao, I. L. R. 36 M. 295 (P. C.) Wherever a new statute is passed, it is always a matter of some nicety as to how far the new statute affects pre-existing law and how far it is to be read subject to it. The construction of the Civil Procedue Code has not been free from this trouble though it affects only procedure and *prima facie* need not much conflict with pre-existing law. Courts were at one time very much exercised as to how far it was consistent with the Civil Procedure Code to allow the Karnavan to sue on behalf of the family. The question whether the managing member of a Hindu family could sue without making the other members parties can hardly be said to be a settled point even now though the Privy Council decision in *Kishan Prasad* v. *Har Narain Singh* [1] has considerably smoothened the conflict. Again, there has been discussion whether the managing member could be said to be a person entitled to give a discharge within the meaning of S. 8 Limitation Act, (7 of the present act). Another question has been whether the managing member or the Karnavan who is also the guardian of his minor coparceners is bound to furnish security before receiving moneys in execution *Harihar Pershad Singh* v. *Mathura Lal* [2] and *Ganesha Row* v. *Tulja Ram Row* [3]. There were questions as to the rights of the managing members to execute decrees in favour of the family, about the application of S. 30, C. P. C. (O. 1, R. 8) about the binding nature of the decrees against widows and managers, about the reversioner's rights to re-open satisfaction entered up by widows—and numerous other questions arising out of the apparent conflict between the provisions of the Code as to " recognised " agents and the general law permitting some people to represent others. The Madras Court had held applying the theory that the Civil Procedure should be read subject to the personal law of the parties that the manager of a Hindu family would not be disentitled from exercising his power as such manager because he happens to be the guardian *ad litem*

1. (1911) I. L. R. 33 A. 272. 2. (1908) I. L. R. 35 C. 561.
3. (1909) 21 M. L. J. 1093.

of one of the minor co-parceners. The Privy Council judgment under notice over-rules this decision. Their Lordships hold that the managing member cannot under those circumstances affect the interests of the minor by compromising without leave. Their Lordships decide the question on the language of S. 462 (O. 32, R. 7). If this decision is taken to lay down that in no case the Civil Procedure should be read subject to the Hindu Law, there might be difficulty in reconciling it with the decision in 33 A. 272. As their Lordships express no opinion on the general theory, it is safer to take it that their Lordships proceed merely on the language of the section. But even so in the light of their Lordship's decision, the decisions of the High Courts in India on at least some of the points noted above might require reconsideration. For instance it is clear that the decisions that dispense with security in the case of managing members cannot stand. It is difficult to see any distinction in principle between O. 32, R. 7 and R. 6. The refinement of *Mitra* J. based on the indefiniteness of the minors' interest is equally applicable to R. 7 but was disregarded by the Privy Council. The decision of their Lordships may have even the effect of frustrating the object of the Legislature in recasting section 8 of the old Limitation Act. Assuming that payment to the managing member is payment to the decree-holders within the meaning of O. 21, R. 1. O. 32, R. 6 has the effect, by expressly prohibiting such receipt without leave, of making it ineffective. As their Lordships do not express any opinion on the general theory, it may be that where minors are not involved the managing member can give a valid discharge and act generally so as to bind the other members. The fact that their Lordships leave the question open whether the managing member can bind the minor when he is not himself the guardian, seems to point to the conclusion that in their Lordships view, wherever the Code is not explicit, there is nothing improper in reading it subject to the provisions of the substantive law governing the parties.

In re **K. Ganapathi Bhatta**:—I. L. R. 36 M. 309. In this case the accused had made a complaint to the police that a theft took place in his house and that he suspected two people whom he named and who were his enemies. On enquiry it was found that no theft at all had taken place in his house. Sanction was accordingly given to prosecute him for an offence under Section 211, Indian Penal Code. He was acquitted on the ground

that the statement that he suspected the two people did not amount to making a charge against them. But the High Court in acquitting him observed that he might properly have been charged under Section 182, Indian Penal Code. The complainant accordingly applied for sanction for prosecuting the accused for that offence. But when prosecution was launched, the accused pleaded *Autrefois acquit*—Section 403, Criminal Procedure Code in bar. It was argued for him that the offence under Section 182 was one with which he could have been charged on the previous occasion under Section 236, Criminal Procedure Code and therefore the acquittal operated as a bar. The argument for the Crown was (i) that this was a case of an independent offence coming within Section 235 Cl. (i), Criminal Procedure Code; (ii) that as a sanction had not been taken for this offence at the time, of the previous trial the Court which tried the former offence was not competent to try the later offence. Their Lordships overruled both the contentions and held that the new trial was barred. Want of sanction which is curable under S. 537 cannot be a jurisdictional defect. Sanction under S. 197 and S. 188 might stand on a different footing though not necessarily. But as these questions are from their very nature not likely to arise in practice it is unnecessary to consider them. The conclusion seems to be unexceptionable.

Ramammal, *in re*:—I. L. R. 36 M. 387. and *Re* **Muthia Chetty**:—I. L. R. 36 M. 392.

In these cases, their Lordships lay down the proposition that the production of a forged document in obedience to a summons cannot by itself amount to using the document within the meaning of S. 471, I. P. C. The act is *an act in invitum* and the party cannot be held responsible for it. We do not see even why the accused should not rely on S. 76, I. P. C., the act for which he is charged being one he was bound by law to do. The protection that this decision affords will of course, be only co-extensive with the duty under S. 162 of the Evidence Act. Suppose a witness is asked to produce a document of a particular date, executed by a particular person &c. &c., is he bound to produce a documet which he knows is not such a document but only purports to be one such? But suppose the document is only tampered with in certain material particulars so as to make it forgery but agrees

with the description in the summons, obviously in such a case he must be protected. Suppose again there was a conspiracy between the party who wants the document and the party producing it in pursuance of which the one gets the other summoned and the latter produces the document which he knows to be forged. Should it make any difference? Again suppose the man is put in possession of a forged document of whose forgery he is aware, after the service of summons; would that make a difference? In determining these questions, it may be necessary to bear in mind that it is hard as pointed out by their Lordships, to put the party to the risk of having to consider whether the document answering the description given in the summons is genuine or not. In this case, their Lordships were also of opinion that the fact that the party in addition to producing the document also swore to its genuineness could not make any difference. Their Lordships exclude the case of conspiracy which may stand on a different footing.

Narayana Kutti Goundan *v.* **Pachiammal**: (1911) I.L.R. 36 M. 426. In this case his Lordship Mr. Justice Sundara Aiyar points out that in applying the English and American cases on subrogation to Indian conditions, an important circumstance is generally forgotten *viz* that sec. 54 of the Transfer of Property Act requires a registered instrument for the transfer of mortgage securities and as such a mere agreement either with the mortgagor or the mortgagee cannot give a person lending money a mortgage lien over the property. His Lordship is of opinion that subrogation can be permitted without an actual assignment only in two classes of cases first, where the person having a previous interest in the property pays off a prior mortgage; secondly where a person believing himself to have title to the property discharges an incumbrance on it. His Lordship does not confine the word "interest" to such interest as would come within S. 91 of the Transfer of Property Act but would take it rather in the sense in which it is used in S. 69 of the Contract Act and would extend it so as to cover reversioners of a deceased Hindu. This view seems to accord with that taken in subsequent cases in this court and has the merit of being sufficiently liberal without at the same time encouraging officious payments.

Marudevi *v.* **Parimakka**:—I. L. R. 36 M. 203=22 M. L. J. 309; **Mathu Amma** *v.* **Gopalan**:—23 M. L. J. 496.

Important as these decisions are, for the points they actually decide, they are more important still from the point of view of sound progress. The attitude usually adopted towards matters Malabar is that they are a genus by themselves, incapable of progress, and requiring treatment however obsolete, provided it is hallowed by the name of Holloway, or some other worthy of Malabar reputation. That the so called peculiarities of Malabar law are in one respect at least, the result of a now exploded legal theory of Holloway, J. and had nothing to do with actualities, has we think been successfully shown by the referring judges in *Govindan Nair* v. *Sankaran Nair* [1]. Another fruitful source of error in Malabar is the confusion that is constantly made between legal rights and social customs or practices. The service done by these cases is in pointing out the necessity for distinguishing them. It is no function of the Courts to bolster up decaying social practices. Their duty is to enforce legal rights, taking the social customs as they are. For instance, take the case of Hindu Law. A sister is entitled to be married. How much is the brother bound to pay towards the expenses of the marriage? The practice of dowry may have recently grown up in the community and it might be impossible to marry the girl without paying a dowry. The Courts will feel no difficulty in including the dowry in the expenses of marriage. Why should Malabar Law alone be incapable of keeping pace with the requirements of society? It was once the practice among Malayalis for ladies to reside in the Tarwad house even after marriage. When such was the Social custom, it was improper for the lady to leave the Tarwad for the husband's house and the karnavan as the director of the morals and maintainer of discipline in the Tarwad might well have refused to maintain her. But now when the practice is changed and it is considered respectable for ladies to accompany their husbands, why should the old rule continue? Formerly, all the members of the family used to reside at the Tarwad house, but now times have changed; requirements of education, and professional duties take the junior members away from the Tarwad house, very properly, and in good many cases to the great advantage of

1. (1909) I. L. R. 32 M. 351 S. C. 19 M. L. J. 350.

the Tarwad as a whole. Is the Court bound to say that they are not entitled to have separate maintenance? Their Lordships point out that the junior members have a legal right to be maintained as co-owners of the property. Ordinarily the custom being for all the members of the Tarwad to live together they are entitled to be maintained only at the Tarwad house. But if for any proper reason, the junior member is unable to stay at the Tarwad house he is entitled to be maintained—subject of course to this limitation that he is not entitled to receive more than he would have got if he were at the Tarwad house. Having regard to the prevalent practice of ladies accompanying their husbands, their Lordships hold that their leaving the house must be taken to be for a justifiable purpose and that in the absence of waiver, they are entitled to recover maintenance from the Karnavan Mr. Justice Subrahmania Aiyar struck a healthy note when he held in *Neelakanta Thiruvambu* v. *Anantha Narayana Aiyar* [1] that a promise by a deceased Karnavan to pay the English tutor of his Anandravan, was for a binding purpose and enforcible against the succeeding Karnavan. We had earlier held that the wife's maintenance may be properly included in the maintenance allowable to a North Malabar Marumakkathayi. We are glad of the further progress indicated by the cases under notice, though they may prove uncomfortable to many a Karnavan.

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1. (1907) 19 M. L. J. 590.

Sanyasi Baritya v. Artaswaro: I. L. R. 36 M. 287. On principle, the conclusion arrived at by their Lordships Benson and Sundara Aiyar JJ. in this case, seems to be irresistible though one can appreciate the doubts that troubled Turner C. J. and Kindersley J. in the earlier case in *Keshva* v. *Rudran* [1]. It cannot be denied for instance that the conclusiveness given by S. 11, of the Oaths Act to evidence given under S. 9 is limited to the proceedings in which the oath is taken. It cannot also be denied that to hold that a judgment based on oath should operate as *res judicata* is indirectly to extend the conclusive effect of such evidence to other proceedings, which looks somewhat unreasonable. As pointed out by their Lordships Benson and Sundara Aiyar JJ. themselves in the case in *Raja Kumara Venkata Perumal* v. *Thatha Ramasami Chetty* [2] S. 13, C. P. C., (present S. 11) cannot in terms apply to compromise decrees. The distinction between a compromise decree and a decree in a suit involving only one issue, like the genuineness of the document sued upon, decided upon an oath is hardly perceptible. Nevertheless a distinction however fine, does exist between a decree based upon a compromise where the Court has to accept the conclusion from the parties and a decree based upon evidence which the law declares conclusive but whose bearing it is for the Court to determine. The one involves no adjudication by the Court while the other does. If as under the old Regulation (see *Vasudeva Shanbog* v. *Naraina Pillai* [3]) oath was a mode of disposal of the suit and not merely a mode of furnishing a superior species of evidence the conclusion of their Lordships in 5 Mad. 259 would have been the only correct conclusion possible. Assume for instance, after a decision is passed, a certain kind of evidence is declared inadmissible by legislation; would that fact make the decision any the less *res judicata*? One is not also certain that their Lordships would have come to the same conclusion but for the then prevalent misconception as to the effect of *Jenkins* v. *Robertson* [4]. The binding effect of a decision passed on an oath on persons represented by the party on record stands on an entirely different footing. With the more liberal views prevailing as to the powers of karnavans and managing members even those cases that hold

1. (1882) I. L. R. 5 M. 259.
2. (1911) I. L. R. 35 M. 75.
3. (1879) I. L. R. 2 M. 356.
4. (1867) 1 H. L. Sc. & Div. 117.

that such decision does not bind the junior members may require reconsideration—but that is a different matter.

Girdhar Lal Prayagdatt v. Manickamma, I. L. R. 38 B. 10. The old maxim that no man shall set up his own iniquity as a defence any more than as a cause of action has been in course of time subjected to limitations and a distinction of importance is pointed out in the case under notice which if applied logically may perhaps lead further than the learned Judges intended to go. It is stated that as between mortgagor and mortgagee or where a transaction entered into for the purpose of defrauding a third party is still executory or merely in the stage of a contract (as distinguished from a conveyance) the party sought to be bound thereby may be allowed to show its real nature even by setting up his own fraud. In the particular case the learned Judges find that the fraud has not been carried out and that may be sufficient to bring the case within the ordinary rule of granting relief; but if the distinction above suggested is good, it need make no difference whether the fraud has been carried out or not. The observations of the Judicial Committee in the case in *Ram Surun Sing* v. *Mussammat Pran Pearry* [1] are quite general though on the facts of that case, the fraud had not succeeded. Their Lordships put it merely as a case in which the mortgagor is entitled to plead and to show that no money was in fact advanced. Stress is laid in that case by their Lordships as also in other cases on the fact of the mortgagee being out of possession and the mortgagor having merely to defend his possession. It will be interesting to see what decision the courts will give if a suit is brought on the footing of a fraudulent usufructuary mortgage under which the mortgagee has been put in possession and the mortgagor sues to recover possession in denial of the mortgage after the fraud has succeeded. The mortgagee is not entitled to possession except to secure the debt due to himself and the debt can be shown to be non-existent.

In **Ganesh Row v. Tulja Ram Row**, 26 M. L. J. 460. Justice *Wallis* deals with a difficult question of Hindu Law on which there is little or no authority and the conclusion he comes

1. (1870) 13 M. I. A. p. 551.

to is rather hard to support on any principle of equity. The learned Judge relies in great measure on what he regards as the settled practice of the court both here and in the mofussil in such matters but we are not aware of any precedent directly in point. The question for decision was as to the right acquired by a son born after an alienation by the father of his interest in property belonging to a joint family consisting at the date of alienation of the father and his first son. The learned judge holds that the after born son will be entitled to a third share in the properties as they stood after the alienation.

He states that his conclusion follows in large measure from the decision in *Nanjayya Mudali* v. *Shunmuga Mudali* [1]. With all respect we do not quite follow his argument. We may assume for the present purpose that, in spite of the alienation, the alienor continues to be a member of the joint family; but it cannot be contended that the alienation is to have no effect whatever on his rights in the family. In the *Ayyagiri* case [2]. *Sir Bashyam Aiyangar* observed at one place that the right of survivorship is incompatible with the position that a member of a Hindu family can alienate his undivided share and interest for value. This of course the learned judge meant to say from the point of view of the alienee. Later on in another part of his judgment, dealing with the position of the members of the family *inter se* he said "An undivided member of a family though he may alienate the whole or any part of his undivided share will continue to be an undivided member of the family with rights of survivorship between himself and the remaining members in respect of all the family property other than what he has transferred." The learned judge felt that this was unfair towards the other members of the family but thought that their only remedy was to become divided; and in any partition to be so made, he said, that the property alienated will be included and debited to the share of the alienor. None of the later cases has had to work out the effect of applying this principle and there is nothing in the judgments in *Nanjayya Mudali* v. *Shunmuga Mudali* [1] throwing light on this question. In the case under notice, the after born sons can acquire right by birth in whatever belonged to their father at the time of their birth. The real question is what is it that belonged to the

1 (1913) 15 M. L. T. 186. 2. (1902) I. L. R. 25 M. 690. F. B.

father after he had alienated his interest in the property. Because he must be regarded as continuing to be a member of the joint family, can it be held that the interest of the other co-parcener *i.e.*, the unalienated portion of the family property is still vested in the father so as to give to the after born son a right by birth therein. We are not at all sure that there is anything either in the Hindu Law texts or in the decided cases to support the view of the learned judge that the fact of the alienation by the father is no reason why the elder brother's share should not be diminished in order to give a share to the after born son. The position of the alienating member is, to say the least, anomalous and it is impossible to work out the rights of the members of the family on a logical basis. In the particular case, it may be said that there is no principle of equity in placing the elder son in a position of advantage as compared with the later born son; but if the principle of the decision is to be applied to cases where the pre-existing co-parceners were brothers or other collaterals, it would appear unjust that the alienating co-parcener's son should be allowed a share at the expense of his uncle. The question will then more pointedly arise as to the application and effect of Sir V. Bashyam Aiyangar's *dictum* that the property alienated should be debited to the share of the alienor.

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We cannot help thinking that too much has been made of the incident arising out of the Advocate-General's Cross-examination of Mr. Weston in Crompton & Co's., case. The complaint against the Advocate-General was that without reasonable grounds or instructions he put a question which imputed forgery to the witness.

It would be interesting to know what was the exact question about which all the fuss has been made.

So far as we can gather, it was this:—

" Q. Can you explain how it comes about that every other
" copy you sent to England except H. H. H. does not bear Mr.
" Brown's signature?

A. Mr. Brown's signature was put on it.

Apparently satisfied with this enigmatical reply, the Advocate-General probed the matter no further. The hearing was continued for three or four days and in the course of it Mr. Grant is said to have complained repeatedly to Mr. Justice Wallis that this question contained an imputation of "forgery". The Advocate-General protested against this interpretation of his question; he explained to the witness before he left the box that no such imputation was intended, and he dealt with the matter again at the close of the trial, ridiculing it. Mr. Justice Wallis seems to have brushed the complaint aside on each occasion and passed it over in silence in his elaborate judgment.

In opening the appeal the complaint was again brought forward by Mr. Grant. And this time the Advocate-General thought fit to insist upon its being gone into by their Lordships.

In England there is no statute, so far as we know, governing cross-examination but our Evidence Act contains express provisions protecting witnesses on the one hand and Counsel on the other. In this case we should think that Mr. Weston's previous admission that he himself had put the crucial date (27th July 1909) at the foot of the specification coupled with the fact that the signature "M. Brown" was on his copy and not on other

copies, justified the question put to him. It related to what at the time was one of the main issues in the case, namely, the identity of the specification agreed to by the parties; and further the Advocate-General informed the Appellate Court that he had definite instruction that Mr. Brown had never signed any specification and that he was not in India on the 27th July 1909.

Much stress was laid on the fact that this aspect of the case was not afterwards pressed, (the Advocate-General having decided not to call evidence on the point of identification when satisfied by Colonel Clibbon's statement that he had never contemplated agreeing to any specification save one). The question was proper or not *when it was put* and it is difficult to see how subsequent events affect the matter unless of course they are such as tend to show that the question was not put *bona fide*. Some part of the discussion turned upon the degree of respect due to the witness's position—a point upon which opinions might vary, but which we think is not quite relevant.

What their Lordships expressed as their "pious opinion" in the matter must, we think, be regarded as practically extra-judicial. But the respect due to their Lordships' opinion requires that we should take note of it. From what we have so far reason to know the opinion of the profession is not unanimous on the point. With reference to the insistence made on the position of the witness, we should have been glad if their Lordships had drawn pointed attention to the observations of this Court in Mr. Sullivan's case, *Sullivan* v. *Norton* [1]. They are as valuable to-day as 25 years ago, if not more so. If their Lordships' opinion is to be adopted as a guide by the legal Profession, cross-examination as a test of truth will, we apprehend, be seriously crippled. It is too much to suggest that at the end of a case, Counsel must formally withdraw all suggestions or implications (made in the course of cross-examination) that have not been proved. The very idea of being cross-examined may be resented by a superior witness, for cross-examination itself implies that the witness has not spoken, at any rate, "the whole truth," according to his oath. Surely that is not the kind of sensitiveness that the policy of the law takes note of.

1. (1885) I. L. R. 10 M. 28.

Chidambaram Chettiar v. Srinivasa Sastrial 26 M. L. J. 473. We invite the attention of our readers to the decision of the Judicial Committee in *Chidambaram Chettiar* v. *Srinivasa Sastrial* [1]. Their Lordships' Judgment which confirms the decision of the Madras High Court in *Chidambaram Chetti* v. *Sami Iyer* [2] is very short; but it is authoritative as setting at rest some doubts occasionally suggested as to the correctness of the decision of the High Court, though the decision itself has been followed in several cases by this Court as well as by the Calcutta High Court. It may now be taken as settled that the principle underlying section 53 of the Transfer of Property Act (though not the section itself) will apply to *movable* property: and that an alienation of the kind described in S. 53 will not be protected merely on the ground of its being one for consideration; it must also be one obtained in good faith. Of course, the onus of proving good faith may be lighter where the transfer is for consideration. (*Vide* I. L. R. 33 M. at p. 338 quoting from 5 Bom. L. R. 142) but there is no difference in principle. The decision under notice must also be regarded as settling that where the fraudulent alienation is by way of *sale*, it cannot be upheld in part, *i.e.*, to the extent to which there is consideration or the consideration has been properly applied. Where however the alienation is by way of mortgage, the question presents greater diffculty and amidst the existing divergence of judicial opinion on the point (see 24 M. L. J. 266 and the cases cited therein) it cannot be said that the decision of the Judicial Committee with reference to a sale will necessarily apply to a *mortgage* as well. One other point is adverted to in their Lordships' judgment *viz*., the rights of the transferee (otherwise than under the transfer) on the basis of his having applied part of the consideration to pay off binding debts, but their Lordships decline to express any opinion in the matter. Reference may be made in this connection to *Palamalai Mudaliar* v. *S. I. Export Co.* [3] where the court allowed the alienee a charge for the amount applied by him in discharge of a prior mortgage on the alienated property.

Mussamat Bhaktawar Begam v. Mussamat Hasaini Khanam 26 M. L. J. 474. The decision of the Privy Council in

1. Reported at p. 478. 2. (1906) 1. I. L. R. 30 M. 6.
3. (1910) I. L. R. 33 M. 334.

Mussamat Bakhtawar Begam v. *Mussamat Husaini Khanam* has an important bearing on a question of mortgage law over which the Courts in India can by no means be said to be unanimous. The question before their Lordships was as to the starting point of limitation for a suit for redemption, the mortgage being one by way of conditional sale and the mortgagee having been put into possession. The arrangement was that the sale would be cancelled on payment of the amount of consideration in nine years. The plaintiffs came to court alleging that as a matter of fact the mortgage amount had been completely satisfied by the usufruct, long before the nine years elapsed and that they were entitled to possession on the date on which the debt was so discharged. On the case so presented the Judicial Committee held that limitation under Art 148 commenced to run not from the expiry of the nine years but form the time when the debt was liquidated by the usufruct. In the course of their judgment, their Lordships make certain general observations as to the accrual of the right of redemption in the case of what may briefly be called 'term mortgages.' When a mortgage deed specifies a particular date for payment or fixes a particular term, the question whether or not the mortgagor can redeem before the date so fixed or before the term expires has often come up before the High courts. Though the question is and is always said to be, one of construction which must depend on the facts of each case, it cannot be denied that the Courts often start with some presumption as to whether the arrangement is *prima facie* for the benefit of the mortgagor or of the mortgagee and the indicia which they rely on in deciding the question of construction are more or less of an arbitrary character. The well-known rule that the right of redemption and the right of sale (or foreclosure) are co-extensive is sometimes regarded as the exception rather than the rule. And in some cases it has been suggested that the language of sections 60 and 62 of the Transfer of Property Act indicates a departure from previous decided cases. Where the usufructuary mortgage is of the kind described in section 62, clause (*a*), the Act expressly fixes the time when the mortgagor has the right to recover possession *i. e.*, when the usufruct has discharged the mortgage debt. In all other cases, whether a date or period is fixed or not, the Act only indicates the time for

redemption by the words "At any time after the principal money has become payable."

Among the decisions of the High Courts on the point reference may be made to *Sri Raja Sethrucherla Ramabhadra Raju Bahadur* v. *Sri Raja Vairicherla Serriya Narayana Raju Bahadur*[1]; *Tirugnana Sambhandha Pandara Sannadhi* v. *Nallatambi*[2], *Rose Ammal* v. *Rajarathnam Ammal*[3], *Radha Krishna Panda* v. *Madhava Naick*[4], and *Vishvendra Thirthaswami* v. *Vishnumurti Bhatta*[5], *Vadgir* v. *Vadgir*[6], *Purnachandra Sarma* v. *Peary Mohan Pal Das*[7].

The judgment under appeal proceeded on the view that the principal money becomes payable only "when the payment becomes obligatory on the mortgagor" *Husaini Khanam* v. *Husain Khan*[8] and the High Court added "the mere fact that the Plaintiff alleged that the mortgage debt was satisfied within the period (of nine years) does not affect the question." The Judicial Committee, in reversing the judgment of the High Court, make the following observations :—

"Ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created the right of redemption can only arise on the expiration of the specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. Such a provision is usually to the advantage of the mortgagor. * * * * * If the fact be as the Plaintiffs allege that the mortgage debt became satisfied under the contract in 1838, the right to recover possession accrued then and the suit is clearly barred."

Achut Ramchandra v. Nagappa. I. L. R. 38 B. 41. While fully alive to the importance of putting a liberal interpretation upon enabling provisions in statutes we are not without doubts as to the correctness of some of the steps in the reasoning of the learned Judges. An appeal was presented on the last day of limitation on what was known to be an insufficient stamp and the pleader stating that he had not funds enough at the

1. (1880) I. L. R. 2. M. 314.
2. (1892) I. L. R. 16 M. 486.
3. (1898) I. L. R. 23 M. 33.
4. (1906) 17 M. L. J. 83.
5. (1908) 18 M. L. J. 236.
6. (1880) I. L. R. 5 B. 22.
7. (1912) I. L. R. 39 C. 828
8. (1907) I. L. R. 29 A. 471.

time to pay the proper stamp duty, asked for time to pay. The court refused to grant time and rejected the memorandum of appeal. Against this order there was an appeal to the High Court. The learned Judges hold that by virtue of S. 107 (2) of the C. P. C., O. VII, R. 11 (*c*) is applicable to appeals also and that under O. VII, R. 11 (*c*) the party is entitled ***as of right*** to demand from the Court that some time shall be allowed to him to pay up the deficient court fee, (the italics are ours). And they further point out that except under O. VII, R. 11 (*c*) there is no power in the Court to *reject* the memorandum of appeal. This would have sufficed to dispose of the actual question raised in the appeal. The learned judges however proceed to make some observations with reference to S. 149 of the code and the operation of the law of limitation in such cases. Emphasising the distinction between the obligation imposed by the law of limitation and that imposed by the Court Fees Act, they suggest that the Legislature might have adopted the principle that where the plaintiff or appellant was within time in the actual presentation of his plaint or memorandum of appeal, he should be entitled to some further time for payment of Court Fees. This view seems to us to require further consideration. It was pressed upon the learned judges that the view of an extension of time *as of right* was inconsistent with S. 149 of the code, which leaves the question of extension to the ***discretion*** of the court. We are not convinced that the argument is sufficiently met by the observation that in the case of a plaint or memorandum of appeal the discretion must be exercised in accordance with O. VII, R. 11 (*c*), for admittedly that provision gives the court no discretion as to the fact of extension but only as to the period of time. The learned Judges say that when the requisite fee is paid within the time fixed under O. VII, R. 11 (*c*), S. 149 would come into play and retrospectively validate the plaint or memorandum of appeal. We venture to doubt whether S. 149 can apply to a case where the court has no discretion to refuse to extend the time. Comparing this section with S. 582 (*A*) of the former Code, the learned Judges advert to the absence in S. 149 of any restriction as to the insufficiency being caused by mistake and infer that by the new provision the court was intended to have a free and unshackled discretion in the matter. We would however draw attention to what appears to be a significant difference between the scheme of S. 582 (*A*) and

S. 149. Under S. 582-*A* the validation was declared by the statute itself without any question of the discretion of the court, the only condition being that the deficient stamp duty should be paid up within a time to be fixed by the court'. But under S. 149 it is left to the discretion of the court to decide *whether or not* a person is to be allowed to make good the deficient court fee and it is only when such payment is allowed and made, that the validation clause will apply. It cannot therefore be assumed that so far as a memorandum of appeal is concerned, S. 149 necessarily places an appellant on a better footing in all respects than S. 582-*A* for the effect of S. 149 will depend upon how the court exercises its discretion, whereas under S. 582-*A* his right was practically absolute in the limited class of cases covered by that section.

Assuming that O. VII, R. 11 (*c*) will apply to a memorandum of appeal but that an extension of time allowed under it will not fall within S. 149, the question will arise as to the operation of the law of limitation in cases where an insufficiently stamped memorandum is presented on the last day. The preponderence of authority is no doubt in favour of the view that the first presentation is good for the purpose of limitation though the memorandum was not properly stamped; but if neither S. 149 of the Code nor. S. 28 of the Court Fees Act is to be applicable to the case, it is difficult to see how the Court can act upon a memorandum so presented.

MOitheensa Rowthan *v.* **Apsa Bivi**: I. L. R. 36 M. 194. This case raises a point of interest as to improvements. A purchaser in Court sale effected improvements while in possession. The question was whether he was entitled to be re-imbursed the cost of those improvements when his sale was set aside. Their lordships held he was. O. XXI, R. 93 permits the refund of the purchase money in all cases where the sale is set aside. It does not provide for anything more. Notwithstanding this omission, Phear J. held in *Morgan* v. *Abdul Hye* [1] that the Court had power to order reimbursement of money laid out on the estate. In a case in *Musadee Mahomed Casum Sherajee* v. *Meerja Ahy Mahomed Shoosty* [2] their Lordships of the Privy Council say that where a person has legal title and it is pleaded in equity to be void, the Court has power to order payment for improvements *i.e.*, in cases coming within S. 41 of the Specific

1. (1854) 6 M. I. A. 27. 2. (1875) 23 W. R. 893.

Relief Act. This power seems to be wider than the power conferred by S. 51 of the Transfer of Property Act in that good faith does not seem to be required. It may be a question whether the wider rule enunciated in 6 M. I. A. 27 is not the proper one to be applied to cases where a Court sale is set aside. Their Lordships do not decide the point as on the facts, their Lordships found there was good faith. Though there is a distinction between stranger purchasers and decree-holder purchasers, one does not see why the latter should be disallowed the cost of improvement, effected by them, when a purchaser whose sale is liable to be set aside on the ground of fraud should be allowed for his. There might be some difference in principle between cases where the sale is wholly void and where it is only voidable. There was a further complication in this case in that the application was not made to the court which set aside the sale but a suit was brought to recover the value of improvements. Apart from cases where there is a statutory duty cast on the defendant to effect improvements or to pay for them, a suit does not ordinarily lie for their value and the right can only be set up by way of defence. In cases coming under S. 41 of the Specific Relief Act or S. 51 of the Transfer of Property Act it is clear that improvements cannot be the foundation of a separate claim as it would have been open to the party claiming their value to set up the claim in defence. The principle of the rule that the right is only pleadable in defence, in so far as it can be said to be founded on reason, is that a party should not be made to pay for improvements when he does not want the property. But where he has made his election to take the property and there is no rule of pleading in the way there does not seem to be any good ground why relief should be refused. There is no rule of pleading, which prevents a person from suing for a relief which he could have got by setting up the claim by way of defence in the executing court. If the old view that the auction purchaser could recover his money by suit is still good law *a fortiori* his claim for improvements should be allowable in suit. One cannot deny however that piecemeal adjudication in this way might greatly embarass the court and there is something to be said for the view that a party should be put to his election to get all his reliefs in the executing court or by suit.

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POWER TO REMAND TO CUSTODY VAGRANTS AND HABITUAL OFFENDERS.

As regards persons likely to commit a breach of the peace or to disturb the public tranquility, a discretion is given to Magistrates to arrest the suspect and to detain him in custody until the completion of the inquiry preliminary to taking security. The question is whether the magistracy is vested with any such power, pending an enquiry under S. 109 or S. 110 of the Code of Criminal Procedure. The police are vested under S. 55 (C. Pr. Code) with power to arrest such persons without an order from a Magistrate and without a warrant and Ss. 60 and 61 of the Code indicate clearly the next step to be taken by the Police officer making such an arrest. Has the Magistrate any power to prolong police custody under S. 167 of the Code? Is he bound to release the suspect on taking a recognizance from him (without sureties) for his appearance at the inquiry or has he power to require sureties for appearance and to remand to custody when sureties are not forthcoming? and lastly, has the Magistrate power to remand the suspect to custody without the option of bail? If he has such power, can any of these powers be exercised by a Magistrate before whom the suspect is produced by the Police, though such Magistrate is not empowered to hold an inquiry into the matter?

It would appear that the legislature has advisedly refrained from empowering the magistracy to remand to custody persons against whom proceedings under S. 109 or S. 110 are pending. In the case of a person likely to disturb the public tranquility, the safety of the public may imperatively demand that the suspect should be deprived of his liberty until it is finally decided whether he should be required to give adequate security for the preservation of the public peace or not. But in the case of a vagrant or habitual thief, the mischief he is capable of, is not in the first place of a far-reaching character and

further the knowledge that proceedings under S. 109 or S. 110 have been instituted would in itself act as a powerful deterrent and minimise the evil consequences, if any, resulting from his being allowed to be at large during the pendency of the enquiry without security being taken from him. After all, it is the primary duty of the police to prevent crimes likely to be committed by persons of this class whose victims are generally few in number, while it may be beyond the powers of the police to prevent a serious breach of the peace affecting public tranquility, if a person sought to be bound over under S. 107 is allowed to remain at large. No doubt even in the case of an habitual offender, after the termination of the enquiry he can be imprisoned if he is unable to furnish security for his behaviour; but it was evidently contemplated that during the brief interval between the initiation of proceedings and the conclusion of the enquiry, police surveillance would prevent the mischief and in any event the harm resulting from his being at large would be infinitesimally small as compared with the injury resulting from his being deprived of his liberty, should it ultimately turn out that the suspicion against him was unfounded or insufficient in details to substantiate by legal evidence a charge under S. 109 or S. 110 of the Code.

This distinction is not always kept in view. In *King Emperor v. Paimal Nai* [1] a judge of the eminence of *Sir George Knox* seems to suggest that a person suspected to come under S. 110 of the Code may be detained in custody if the Magistrate has the necessary information under which he could make the preliminary order in writing as required by S. 112 of the Code; but the *proviso* to S. 114 of the Code leaves absolutely no room for doubt, and the discretionary power vested in the Magistrate is confined to those cases where breaches of the public peace cannot be prevented otherwise than by the immediate arrest of the suspect.

It may also be noted that the Legislature has provided that the enquiry into cases of alleged breach of the peace shall be conducted in the same way as summons cases while the inquiry in good behaviour cases shall follow the procedure laid down as nearly as may be for the trial of warrant cases. Now it may at first sight appear, a warrant case being a more serious offence than a summons case, a good behaviour case is

1. (1912) 10 All. L. J. 351=13 Cr. L. J. 827=17 Ind. Cas. 571.

treated by the Legislature as graver and more heinous than that of a person merely called on to preserve the public peace under S. 107 of the Code. The premises are sound but the inference does not follow. In dealing with measures for the prevention of crime the Legislature has to reconcile the conflicting claims of social welfare on the one hand and individual liberty of action on the other. The inquiry is made less formal in proportion to the magnitude of the injury to the public sought to be averted. Individual liberty has to be sacrificed to maintain public tranquility which is of paramount importance to the very existence of the State. Hence the inquiry will follow the less formal mode prescribed for the trial of minor offences (S. 117 of the Code) and the Magistrate is absolved from the duty of recording evidence in full (S. 355 of the Code) because no appeal is provided from his final order binding over a person to keep the peace. On the other hand a good behaviour case has to be enquired into in the same way in which the trial of a warrant case is conducted. The evidence has to be recorded in full (S. 356 of the Code) and from the final order of the Magistrate demanding security for good behaviour a right of appeal is secured by S. 406 of the Code; and all this solicitude on the part of the Legislature would indicate that a case under S. 109 or S. 110 is viewed as less grave in its effects upon society at large than one under S. 107 of the Code. The circumstance that failure to give security for keeping the peace is visited by *simple* imprisonment (123 (5), Cr. P. C.), while in a similar case of bad livelihood the imprisonment provided is rigorous or simple as the court may adjudge in its discretion (125 (6) Cr. P. C.) only illustrates the principle that consciously or unconsciously sentiments and prejudices of our Rulers are allowed to colour the enacted law of this country. In European countries where *duelling* is looked on with great favour and even applauded, the fact that a person is bound over to keep the peace is not considered a circumstance very much to his discredit. It may be one of the factors going to enhance his social importance as is evident from the question very often asked from the Bench "Why should your client object to giving security to keep the peace."

The question may then be asked, what is the use of empowering the police to arrest (Ss. 51, 151, &c. of Cr. P. C.) if on arrest the Magistrate has no option but to release the suspect. Very

often Magistrates demand bail from such persons for their appearance (e. g., ***Raghunandan Pershad*** v. ***Emperor*** [1] and bail is willingly furnished. Is such procedure unauthorised and illegal, if proceedings are ultimately initiated only under S. 109 or S. 110? Having regard to the terms of S. 496, acceptance of bail, when offered, is not improper; but is the Magistrate entitled *to demand* bail if he is bound to let the suspect go on his own recognizance on failure to comply with the magisterial demand? The answer in the affirmative of the learned Judges of the Bombay High Court in ***Emperor*** v. ***Ghulam Husain***[2] seems to be based on an insufficient consideration of the wording of S. 496 Cr.P.C. Offences dealt with in Schedule II being grouped as *bailable* and *non-bailable*, a Magistrate has ample power to commit to custody all offenders even in bailable cases where bail is not forthcoming. But the very object of Part IV of the Cr. P. Code is to prevent a man from becoming an offender and as part of a scheme of carrying out this object, the Police are empowered to arrest persons whom they reasonably suspect as likely to become offenders, if not arrested. But at the same time when a person of this class is once arrested he has to be produced forthwith either before a Magistrate or an officer in charge of a Police Station. What the legislature evidently expects is, that the very fact that the authorities look upon him as a suspect and that they have their eyes keenly directed on to him and watching his every movement would tend in a large measure to achieve this primary object, in view, *viz.*, the prevention of crime. And if this be the idea of the legislature, in empowering the police to arrest, one can readily understand why the further sacrifice of individual liberty was thought unnecessary by advisedly refraining from empowering the magistracy to remand the suspect to custody This seems to be the reasonable conclusion on looking at the scheme of the Indian Criminal Law as a whole. The slight departure from this wholesome principle shadowed forth in clause 16 of *the Criminal Procedure Amendment Bill* now on the legislative anvil, by making provision to enable Magistrates to take security in urgent cases before commencing the enquiry under S. 117, is but another instance of the sacrifice of principle by reason of piece-meal legislation.

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1. (1904) I. L. R. 32 C. 80. 2 (1911) 12 Cr. L. J. 533=12 Ind. Cas. 801.

As stated above the primary duty of the Police is to *prevent crime.* It is only when they are found to have failed to discharge this duty, the other faculty of *detection of crime* has to be invoked. The existence of every detective officer in the police force can be accounted for only by the presence of a score or more of his fellow officers unable to discharge their primary duty. If a man is suspected to be a habitual thief or a habitual receiver of stolen property, the police will stand self-condemned if they demand that he should be remanded to custody because they have their suspicions about him. If the law contemplated that every subject may be remanded to custody pending further enquiry as to his good behaviour, the police force may safely be reduced to a few officers richly endowed with the faculty of forming suspicions and there will be no scope for the many that prevent crime and the few that detect crimes when committed.

The conclusion seems to be that the legislature has not sacrificed individual liberty to a greater extent than was deemed absolutely necessary. The Magistracy cannot call for bail from a person against whom proceedings under S. 109 or S. 110 are contemplated or pending, because they are not empowered to remand such persons to custody under any circumstances pending the inquiry. The police no doubt can arrest suspects; but the Magistrate before whom they are produced has no other option but to take the suspect's own recognizance for appearance and if he fails to appear he may be arrested for having committed an offence under S. 174 I. P. C. and remanded to custody, if he is unable to offer bail in regard to that offence. The proposal in clause 16 of the amendment Bill is therefore reactionary in its character and ought to be strenuously opposed before it is allowed to become Law.

S. SWAMINADHAN.

NOTES OF INDIAN CASES.

Krishnadixit v. **Baldixit**, I. L. R. 38 B. 53. Some of the observations in this case on the question of limitation seem to us to be too broadly stated. The plaintiff was leasing out and collecting the rents of certain lands as defendant's agent. About 1893 or 1894, the agent asserted that he was the owner of the lands and thereafter never accounted to the defendants for the

rents collected. The question was, whether that gave rise to an adverse possession on which a prescriptive title could be based. One of the learned judges (*Shah J.*) holds, on the facts, that there was not sufficient repudiation of the agency or overt act on the part of the agent to change the character of the plaintiff's possession from permissive into adverse. The decision might well have rested on this ground. The other learned judge (Heaton J.) however bases his decision on broader grounds (and some remarks in Justice *Shah's* judgment tend in the same direction). It is stated that so long as the land was held under the tenancy, the tenant's possession was that of the defendant and the defendant's rights to the land were absolutely unaffected in any particular by the reiterated assertions made by the plaintiff of an adverse title or by the fact that as the rents were retained ' by the plaintiff. The reason given is that the possession or occupation rather, was with the tenant and the tenant was the tenant of the defendant, that possession legally was with the defendant. We beg leave to doubt the correctness of the propositions so generally stated; and the passage cited from *Secretary of State for India* v. *Krishnamoni Gupta* [1] does not really advance the argument. It is no doubt ordinarily true that the possession of a tenant is the possession of his landlord but if the tenant pays the rent to a person who claims against the landlord, with knowledge of such claim, it is too much to contend that such third person is not in adverse enjoyment as against the landlord. His claim is not answered by saying that unless the landlord chooses to avail himself of the forfeiture, the tenant's possession is not adverse to the landlord (*Cf.* however *Ittappan* v. *Manavikrama* [2] *citing Doed Graves* v. *Wells* [3].) The judgment also assumes that during the period of the tenancy the landlord *could* not have sued for possession. This assumption will not be well founded, at any rate in cases in which the tenant was paying rent to a third party with knowledge that he was claiming adversely to the landlord. Where rent is paid by the tenant to a third person without knowledge of his adverse claim, the question may stand on a different footing, but we are not sure if even in that case the third party cannot claim that his receipt of rents was tantamount to possession (whatever the tenant's belief may be) and if the landlord was aware of his adverse claim, his possession was adverse to the landlord. The

1. (1902) I. L. R 29 C. 518 2. (1897) I. L. R. 21 M at 160.
3. 10 A. & E. 427.

observations in *Lyell* v. *Kennedy* [1] would rather seem to support the view that if the agent could prove that he received the rents in open assertion of a hostile title it would amount to an adverse possession by which a prescriptive title could be acquired. What would suffice to change the agent's receipt of rents into a hostile claim as against the principal is of course a different question : as to which see *Williams* v. *Potts Dadoba* v. *Krishna* [3].

Ramcharan Bajpai *v.* Rukhal Das Mookerjee, I.L.R. 41 C. 19; **Bijoychand Mahatab *v.* Kalipada chatterjee** I.L.R. 41 C. 57. In these cases the Calcutta High Court had to consider certain interesting questions connected with endowments. One was as to the tenure of the office of "Superintendent" under the particular trust deed, whether his relation to the trustees was that of a *cesti que trust* or of a mere servant. Holding him to be a 'servant' only, the learned judges say, as to the duration of the office, that the power to appoint ordinarily involves a power of dismissal, unless there is anything special in the nature of the office or in the deed or statute under which the appointment is made. It must however be stated that the nature of the exception is such that the application of the rule is oftentimes attended with considerable difficulty. And the learned Judges lastly proceed to apply in terms the ordinary rule obtaining in the law of master and servant and hold that even if the superintendent had been wrongfully dismissed, his remedy was not by way of restitution to his office but only in damages. Apart from the particular case, we beg leave to doubt the correctness of so far assimilating the law on these and cognate matters to the ordinary law of master and servant. In most of our religious institutions there are several offices in respect of which it may not be possible to establish a tenure by custom but yet the notions of old clinging to them have not given place to the modern idea of contractual relationship; and it cannot be denied that the proper test by which to determine the right of dismissal would, in some at least of such instances, be, not the willingness or otherwise of the person appointing, but the interests of the institution.

The second case was of a 'novel' description. One of the questions was as to whether a condition in a grant for the worship

1. (1889) L. R. 14 A. C. 437. 2. (1871) L. R. 12 Eq. 149.
3. (1879) I. L. R. 7 B. 34.

of a particular deity came to an end when the temple was washed away and the image broken. The learned judges relying on the decisions in *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra* [1] hold that an endowment is not affected by the destruction or mutilation of the image, and that, therefore, when another temple was built in the place and a new image set up, the grantee was bound to perform worship in that temple. We are not disposed to question the decision in the particular case. But in the application to such cases of the general principles laid down in the Full Bench Judgments in *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra* certain difficulties are likely to arise which it is well worth bearing in mind. Suppose in this case, the new temple had been built and the new image set up by somebody other than the original donor or the new image had been given a different name or the temple built in a neighbouring village; we venture to doubt if the decision would have been the same. One may take the liberty of suggesting that when the endowment is applied for the worship of the new image, it is an application *cypres* rather than the continuation of the original trust and this will involve some difference in logical consequences.

The Assistant Sessions Judge of N. Arcot v. Ramasawmi Asari, 26 M. L. J. 235. The complainant, in this case, entrusted certain jewels to the accused at Vellore to be sold on commission. The latter took the jewels, pledged some of them at Bangalore for his own use and misappropriated the rest at Madras. He was charged before the Sub-Divisional Magistrate of Tiruvannamalai with criminal breach of trust and criminal misappropriation. On a question of jurisdiction being raised, their Lordships have held that the Magistrate had jurisdiction under S. 179 of the Criminal Procedure Code as the loss to the complainant occurred at Vellore and it is a "consequence" within the meaning of the section. This reasoning seems open to question. S. 179 Cr. P. Code contemplates an offence by reason of anything done *and* of any consequence which has ensued, so that both the act and the consequence are necessary ingredients in the offence. The section would seem to be applicable to continuing offences or offences which, by reason of aggravation, become a different offence. Illustration (*d*) to the

1. (1909) 10 C. L. J. 355 S. C. I. L. R. 37 C. 128 (F. B.)

section, on which their Lordships rely, shows that the wound was caused in Baroda, the consequence, namely, death, ensued at poona and therefore the offence of causing A's *death* is triable in the latter place. The other illustrations too, do not extend to the case of an offence complete by the act itself without any reference to the consequences. In the case under consideration, the act of dishonest misappropriation or criminal breach of trust occurred at Bangalore and the offence having become complete, the fact of subseqnent redemption or accounting for it at Vellore, will not affect the question. See explanation to S. 403 I. P. C. Again, their Lordships hold that the loss occurred at Vellore; if the complainant shifted to some other place, could it be said that he suffered no loss ? The wrongful gain to the accused occured at Bangalore and that is enough. It is clear therefore that the loss or the gain occurred at Bangalore and not at Vellore. If neither the act nor the consequence occurred at Vellore, the section does not give jurisdiction to the Magistrate. Their Lordships' judgment can however be supported under S. 181 cl. (2) which specially provides for the offence of criminal misappropriaton and criminal breach of trust, on the ground that the jewels were *received* at Vellore. Though their Lordships refer to S. 181 cl (2), attention was not drawn to the fact that the legislature could not have provided two sections if really the above offences are governed by S. 179. Two Allahabad cases are referred to *Langridge* v. *Atkins*[1] and *Q.* v. *O'Brier* [2] the first of these supports the view taken by their Lordships, but the earlier case proceeds to interpret S. 179 in a different way. According to *Q.* v. *O'Brier* [2] though the offence becomes complete by the act itself, if the consequence ensues at another place, S. 179 is applicable. This is not the view taken in the later cases.

Regarding the applicability of S. 188 of the Criminal Proceedure Code, their Lordships rightly hold that if the offence can be enquired into, under any one of sections 179 to 184, the fact that sec. 188 is intended to provide for offences committed beyond British India does not deprive the courts in British India of the jurisdiction given to them under the earlier sections.

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1. I.L.R. 35 All. 29. 2. 19 I.L.R. All. 111.

SUMMARY OF ENGLISH CASES.

Whiteley v. Delaney: (1913) A. C. 132.

Subrogation—Mortgage—Merger—Payment of prior Mortgage—Ignorance as to Existence of subsequent Mortgage—Effect of—Rectification—Circumstances Entitling pleadable in defence.

In this case, the Lower Courts had much canvassed the extent to which *Toulmien* v. *Steere*[1] remains good law. Their Lordships' view of the facts made it unnecessary for their Lordships to express an opinion on the matter. Their Lordships seemed to be clear that the doctrine of *Toulmin* v. *Steere*[1] should not be extended.

There were two mortgages on a land. The mortgagor being pressed by the first mortgagee agreed to sell the property to his daughter and she asked a solicitor to find somebody to advance funds to her to enable her to pay the 1st mortgagee. The solicitor introduced one Farrar who agreed to advance the money on the understanding that with it the mortgage was to be discharged and he should be given a first mortgage on the land. The transaction was carried out by a re-conveyance by the mortgagee, a sale by the mortgagor and a mortgage by the vendee in favour of Farrar. All the parties except the mortgagor were unaware of the 2nd mortgage.

Such being the facts their Lordships held that the 2nd mortgagee was not entitled to claim priority as against Farrar. Their Lordships put it this way. Either it was a case of mutual mistake or it was a case of fraud. The intention of the parties to the transaction being that Farrar should have a first mortgage he was entitled to have the deeds rectified so as to give him that right against the second mortgagee who was, in respect of the priority claimed only a volunteer. It was not necessary that a suit should be brought for rectification. The circumstances entitling rectification might be pleaded as a defence to a suit brought upon the footing of the unrectified deed. This was putting it as a case of mutual mistake. Putting it on the footing of fraud, the second mortgagee being a volunteer would not be allowed to take advantage of the fraud of the mortgagor through whom for this purpose he must be taken to claim.

1. (1817) 3 Mer. 210.

The Lord Chancellor was of opinion that if the question was only whether there was an intention to merge, there was a merger in this case on the wording of the deeds.

Lord Dunedin states the effect of cases on merger thus. "Where by appropriate conveyancing the charge could be preserved, then it will be for the party alleging the charge to be dead to show an intention to that effect. What have been called the presumptions arising from the continued existence of the charge being to the benefit of the person who has paid it off as *e.g.*, in the case of a limited owner are just I think other ways of expressing the same rule." In that application of the rule to the facts of this case, his Lordship thought that the question depended on whether the true payer of the charge was Farrar or the mortgagor.

(1912) 1 Ch. 735 reversed.

Attorney General for the Province of British Columbia v. Attorney General for the Dominion of Canada: (1914 A. C. 153).

Fishery right—Nature of—appurtenant to the Solum—Severance by grant or prescription—Not by custom—Public Right of navigation and fishery—Analogous—Ownership of shore for 3 miles—Question of international law.

In the course of this decision, their Lordships of the Privy Council make certain important observations as regards fishing rights and the crown rights to the bed of the sea within 3 miles of the shore.

The general principle is that fisheries are in their nature mere profits of the soil over which the water flows and that the title to a fishery arises from the right to the solum. A fishery may of course be severed from the solum and it then becomes a *profit a prendre* in alieno solo and an incorporeal hereditament. The severance may be effected by grant or by prescription but cannot be brought about by custom for the origin of the custom would be an unlawful act.

The authorities treat this broad principle as being of general application and not restricted to inland or nontidal waters. It applies equally to tidal and nontidal waters, whether the owner

be the Crown or a private individual. In the case of tidal waters the exclusive character of the title is qualified by another and paramount title which is *prima facie* in the public. The subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike. The legal character of this right is not easy to define. It is probably a right enjoyed so far as the high seas are concerned by common practice from time immemorial and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean. The right into which this practice has crystallized resembles in several respects the right to navigate the seas or the right to use navigable river as a highway and its origin is not more obscure than that of these rights of navigation. Finding its subjects exercising this right from immemorial antiquity, the Crown as parens patriae no doubt regarded itself bound to protect the subject in exercising it and the origin of the right as legally cognisable is probably attributable to that protection, a protection which gradually came to be recognised as establishing a legal right enforceable in the Courts. This right cannot be restricted except by the Legislature. The right of the public to fish in the sea does not rest upon the crown's right to the soil.

Their Lordships say with reference to the ownership of the crown to the bed of the sea within the three miles limit that the question is one of International Law and the conflict of judicial opinion which arose in *Reg* v. *Keyn* [1] is not likely to be settled till the subject is examined at a conference of the powers. Till such a conference takes place the question whether the shore for three miles of the coast forms part of the territory of the Crown or is merely subject to special powers necessary for protective and police purposes must remain a doubtful one.

In re **Blow : St. Bartholomew's Hospital (Governors) v. Camden,** 1914 I. Ch. p. 254 (C. A.)

Statute of Limitations—Trustee Act, S.1, Sub. S.(3), S-8, Sub.S.(1) Cl. (a) and (b)—Administration—Creditor's action—Devastavit—Distribution of the testator's assets more than six years before the action—Liability of the executors of an executor—Covenants in a lease binding on the testator.

1. (1876) 2 Ex. D. 63.

A testator died in January 1902, bequeathing a leasehold interest in some poperties to his wife for life and after her death to his children. In October 1902, the two executors distributed the lease hold interest to the beneficiaries without making any other provision for the liability under the covenants of the lease than an indemnity from the beneficiaries. The rents due under the lease were paid properly till 1909. One of the executors died in 1906. In 1911 the present creditor's administration action was brought on the covenants in the lease against the surviving executor, the beneficiaries and the executors of the deceased executor. The executors of the deceased executor pleaded S. 8 of the Trustee Act, by which a trustee who commits a breach of trust *bona fide* is enabled to take advantage of the Statute of Limitations, in defence. Under S. 1 of the Act, the term "trustee" was made to include "executors," ***Held***, by the Court of Appeal (Cozens-Hardy M. R. and Swinfen Eady L. J., Phillimore L. J. dissenting) that though the action was a common creditors action, the executors of the executor were entitled to the protection of S. 8, (1) (*b*) and lapse of time after 1902 was a defence.

Per *Swinfen Eady L.J.* There is no difference under the section between the creditor's administration action and an action by a beneficiary; a devastavit more than six years prior to the action can be pleaded by the executor.

Per Phillimore, L.J.—The action could be brought only after the default in payment of rent; and the action in 1911 was within time and the executors of the executor, were liable as they could plead limitation only as in an action for money had and received.

***In re* Pearce Alliance Assurance Company Limited v. Francis**, 1914. 1 Ch. p. 254 (C.A.)

Will—Construction—"Children"—Whether includes illegitimate children and when.

A testatrix by her will gave the residue of her property to her brother during his life-time; and after his death in trust "for all or any of the children or child" of the brother etc.

It was found that the brother had six children by a woman whom he had not married but to whom he was reputed to be married, and two children by his wife whom he married after the

death of that woman; and that the testatrix believed all the eight children to be his legitimate issue the first six by his first wife and the other two by his second wife. *Held* that under the gift only the two legitimate children took the residue. The only two cases where the term "children" can be construed to take in illegitimate children are (1) where the testator has made a dictionary of his own for the constuction of his will (2) where it is impossible from the circumstances to give any meaning to the term without taking it to mean illegitimate children.

Hill v. *Crook* [1], *Dorin* v. *Dorin* [2] followed.

In *re* **Major: Taylor v. Major** 1914 1 Ch. p. 278.

Will—General charge of debts including mortgage debts—Specific devise—Of incumbered and unincumbered realty—Later clause creating a trust of the residue for conversion and payment of debts including mortgage debts—Locke King's Act.

A testator by his will stated " First I will that all my just debts including mortgage and funeral and testamentary expenses be paid and satisfied." Then he made a specific bequest to one of his sons; and afterwards a specific devise of incumbered and unincumbered realty to his several children. Of the residue of the realty and personalty he made a trust for conversion and payment of his lawful debts including mortgage-debts.

Held, on originating summons,

(1) That the real and personal estate comprised in the express trust for payment of debts should so far as it extends be applied rateably in the payment of all the debts, mortgage-debts and otherwise of the testater.

(2) That the initial general charge for the payment of debts was explained and specified by the creation of trust over specific property in the end.

(3) That each of the mortgaged properties should bear the proportion of the mortgage debt not discharged by the specific fund.

(4) That the other debts and funeral and testamentary expenses should be borne rateably by the specific legacy and the pro-

1. L. R. 6 H. L. p. 264. 2. L. R. 7 H. L. p. 560.

perties specifically devised, the share which the latter have to contribute being their value less the proportion of mortgage debt on each not discharged by the specific fund.

Bebb v. Law Society, 1914 1 Ch. p. 286 (C. A.)

Solicitor—Admission of women—Disqualification,—Usage,—Solicitors Act, 1843 s. 48.

Women cannot be admitted by the Law Society for the preliminary examination with a view to becoming solicitors. The interpretation clause in S. 48 which provides that words importing the masculine gender shall include a female has not the effect of removing the pre-existing disability of women acting as solicitors. Women are under the common law under a disability to become solicitors or attorneys. There has also been that long uniform and uninterrupted usage which is the foundation of the greater part of the common law.

In re **Working Urban District Council (Basingstoke Canal)** Act 1911; 1914 1 Ch. p. 300 (C.A).

Corporation, for carrying out a public undertaking, Meaning of " successors and assigns "—Dissolution — Assignment—Statute of Limitation,—Statutory obligations—Marginal notes in private Acts of Parliament.

The terms "successors and assigns" used after a company created by statute for carrying out a public undertaking, such as a canal, are unmeaning and are no more than a surplusage. Such a company cannot assign its undertaking to another company without the latter being recognised as an assignee by an Act of Parliament. Where however, a liquidator of the former company sold the canal, with the sanction of court to some persons and the company is dissolved and the persons are in enjoyment of the canal for more than the statutory period, they get a right to the canal; but the obligations attaching to the original company by statute creating the original company do not attach to them. Where subsequently an Act of Parliament is passed by which a local body is authorised to make repairs to some bridges on the canal and recover the expenses for the same from the company, *Held,* the company having ceased to exist, the local body cannot recover the costs of the repairs and the costs of this Act from the persons so enjoying the canal.

Semble. Per Phillimore J.—In some Private Acts of Parliament marginal notes form part of the Acts themselves, where the marginal notes are mentioned as already existing and published by the Parliament, the general rule with regard to marginal notes in Public General Acts being based on their insertion neither by the Parliament nor under its authority.

JOTTINGS AND CUTTINGS

Judicial Joking.—The Court is very much obliged to any learned gentleman who beguiles the tedium of a legal argument with a little honest hilarity,' Chief Justice Erle told a member of the Bar who apologised for a sally that set the Court in a roar of laughter. To judge from the protests which are being made against judicial humour, there are persons who regard even a 'little honest hilarity' as something quite alien to the serious work of the Courts. They would not object to a flash of wit from the witness box; they might even tolerate a witticism from the Bar; but they appear to think that the dignity of the Bench requires that a judge, no matter how mirthful or tedious the proceedings over which he presides, should sit all day 'like his grandsire cut in alabaster.' Judicial joking may, no doubt, sometimes be carried to excess. An incident in the judicial career of Sir James Fitzjames Stephen—by no means, in the ordinary sense, a 'judicial humorist'—indicates its dangers. He was trying a slander case in which both the parties were Billingsgate salesmen and the counsel for the defendant did not fail to take full advantage of the humour of the situation. Mr. H. F. Dickens, who represented the plaintiff, seeing the judge, as well as the rest of the Court, impressed by the jocular aspects of the case, made a strong effort to bring out the serious injury that had been inflicted upon his client. Mr. Justice Stephen, his sense of fairness aroused was sobered in a moment, and summed up in favour of the plaintiff. After the jury had returned their verdict the learned judge sent this note to the plaintiff's counsel: 'Dear Dickens,—I am very grateful to you for preventing me from doing a great act of injustice.' Perhaps some judges would display a better regard not only for their reputation as wits but also for the dignity of the Bench if their attempts at jocularity were rather less frequent. For laughter, though it certainly need not be

banished from the courts, may sometimes create an atmosphere in which the serious character of the work is prejudiced. A 'little honest hilarity' in a court of justice is one thing; an habitual striving after the mirth-provoking is quite another. *Law Journal 21st February* 1914.

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Judges and their Pensions.—A novel suggestion is made by Sir Henry Gibson in the report he has issued as Comptroller and Auditor-General on the Consolidated Fund Account for the past financial year. His eagle eye has detected the granting of an annuity of 500*l* to a County Court Judge who was compelled by ill-health to retire within five months of his appointment. Noticing that the County Courts Act, 1888, prescribes the appointment of 'fit persons' as County Court judges—an expression which, had he been more familiar with judicial matters he would have known referred to professional capacity rather than to physical condition—Sir Henry Gibson was prompted to inquire whether any steps are taken to ascertain that nominated judges are healthy as well as learned. The Lord Chancellor, whose reply appears to have been confined to the case of the County Court Judge in question, stated that his 'position at the time of his appointment, as regards both his practice at the Bar and his state of health, was well known to everyone in the profession, and no exception could have been taken to his qualifications.' Every member of the profession who is acquainted with the County Court Judge referred to—and his identity may so easily be established that it is unnecessary to mention his name—will fully concur in the Lord Chancellor's tribute to his high qualities. But this reply does not appear to have satisfied Sir Henry Gibson, who deems it desirable to add ;

> I am, however, not informed whether any system or regulation exists for securing in judicial as in other public appointments that the persons appointed have the necessary physical fitness, failing which they come prematurely on a pension list, which, unlike the ordinary civil pension list, is not statutorily safeguarded by any requirement of a minimum period of public service or by graduation of pension according to length of tenure of office,

Are we to understand that this vigilant guardian of the public purse entertains the view that judges—High Court as well as Country Court judges—ought to be required to undergo a medical examination before they are permitted to start upon their

judicial duties? We refuse to believe that the public would like to see the Bench reduced to the level of the Civil Service in this or any other matter. A member of the Bar who is capable of bearing the responsibilities of judicial office can surely be trusted not to undertake them if he knows that he is not physically fit for the work. The observations of the Comptroller and Auditor-General might have been justified if the instances of early retirement from judicial offices had been numerous. As a matter of fact, they are very few. Sir Arthur Jelf retired from the Kings Bench Division within nine years of his appointment, and Sir Henry Sutton after less than five years' service; while Judge Hans Hamilton and the late Judge Cyril Dodd, K. C., retired from the Country Court Bench after serving for six years. These are the only recent instances we can recall of premature retirement from the High Court and the County Court, and not one of them, either in the circumstances of the appointment or in the length of the service, lends any weight to the strange suggestion that judges ought to be medically examined before they take their seats on the *Bench—Ibid.*

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Costs in Alternative Claims:—Where a plaintiff is in doubt as to the person from whom he is entitled to redress he is permitted by the Rules (Order XVI., r. 7) to join two or more defendants, so that the question as to which of them is liable may be determined at the trial. And, although there are obvious risks in this process, the tendency of the Courts in recent years has been to visit the defendant who is found to be actually in the wrong with the whole costs of the proceedings. In *Vine* v. *National Motor Car Co. and L. G. O. Co.*, a year ago, Mr. Justice Bucknill made such an order against the first defendant, who had simply repudiated liability but were found to be the parties really responsible, being of opinion that such a repudiation was not sufficient, but that they 'should have said something' which would have been a guide to the plaintiff, with his limited knowledge of the facts, as to whether he ought to join the other defendants or not. A further extension of the principle was made by Mr. Justice Bankes last July in another action by a Mr. Mulhern against the same two defendants, in which the omnibus company, being first applied to, had followed the course suggested by the earlier decision, but

the learned Judge thought that the rule should apply equally to the second party attacked. In his opinion, it was necessary for any defendant who desired to escape the obligation to pay the costs of an alternative defendant to do something more than merely deny negligence on his own part; he must go as far as to say that he did not throw any responsibility on the other party. We commented on these decisions at the time (48 LAW JOURNAL, pp. 119 & 450), suggesting doubts on these rulings, and now the Court of Appeal has held (in *Bestermann* v. *British Motor Car Co. and the L. G. O. Co.*, February 13) that there are no such duties on the part of co-defendants, and that the rules as stated could not be supported. The main authority for the imposition of this new liability on co-defendants is, of course, *Bullock* v. *London General Omnibus Co.* (1907), and the test there laid down by the Master of the Rolls for deciding whether an unsuccessful defendant should bear the costs payable to a successful one was, whether in the circumstances of the case it had been reasonable for the plaintiff to join both defendants. That the Court has now declared to be the only proper test, and no attempts to define the obligations of parties charged as co-defendants will meet the case so well as this. In the particular case the Lords Justices rejected the contention that, unless it appeared that the unsuccessful defendants had misled the plaintiff into joining the successful one, it could not, for this purpose, have been reasonable for the plaintiff to join them both. And, as the cases now stand, the procedure depends, not on the observance of any particular condition by the defendants, but on the 'reasonableness' of the plaintiff's action in joining both defendants. That may be very vague, but it is better, perhaps, than any fixed statement of conditions which then would be easy for a defendant to evade at the expense, of the injured person.—*Ibid.*

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The Public Influence of Lawyers.—Lord Haldane, in the interesting speech he delivered at the City of London Solicitors' Company's banquet, remarked that 'lawyers were the leaders of public opinion in this country' and that 'they had it in their hands to make or mar much of the future.' Never was the truth of these words demonstrated more strikingly than in the Home

Rule crisis. All the three chief protagonists in the Irish question—Mr. Asquith, Sir Edward Carson, and Mr. John Redmond—are members of the Bar. To these three men, trained in a profession—which, whatever the ignorant may believe, is accustomed to strive for peace rather than to delight in war, the nation is looking anxiously for a peaceful settlement of the Ulster problem, and upon them all will rest a very heavy responsibility if, because of any inadequate regard for that spirit of compromise which so often secures the triumph of justice in the courts, they fail to agree upon some reasonable plan by which the threatened dangers, on one side or the other, may be avoided. *Law Journal 28th February,* 1914.

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The Jurisdiction of the Privy Council.—The aptness of the Judicial Committee of the Privy Council for determining the complicated and grave constitutional and Imperial questions which are continually arising in one or other part of the British Empire is signally marked in the developments of the last few years. That august body has been called upon to pronounce on the validily of a proposed Canadian marriage law, on the legality of the retention of a seat in the House of Commons by a member of a firm acting for a Government department, on the true boundary between the States of the Australian Commonwealth. and on the powers of a Canadian Provincial legislature over the waters which bound the coast of the colony. All these questions have been brought before it by a somewhat extraordinary procedure, under which vexed problems of a quasi-legal character can be referred to His Majesty's Council; and it is in virtue of this residuary jurisdiction that the Crown is about to submit to it the question of the ownership of certain lands in Southern Rhodesia which are claimed by the Chartered South Africa Company Section 4 of the Act of William IV. (1834), which established the Judicial Committee, provided that His Majesty might refer to the Committee, in addition to any appeals coming from Courts of Justice in the Empire, 'any such other matters whatsoever as His Majesty may think fit, and the Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon.' There can be little doubt that the decisions of the martial law tribunals in South Africa could be referred to the same process of revision, if the Sovereign so desired. They

are not deemed to be regular judgments in courts of law, so as to be subject to appeal to the Privy Council exercising its ordinary jurisdiction; but they are within the class of matters which have been the object of special reference. In the case of *Attorney-General* v. *Tilnoko* [1907] in somewhat similar circumstances the Judicial Committee refused to revise a sentence of a martial court. But, though it may not be expedient to resort in every doubtful case of gravity to the ultimate judicial authority in the Empire, the power of reference is a potent instrument for securing an Imperial equity, which may in time develop into a special form of British federal law.—*Ibid.*

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The Legal Profession : *Lord Reading*, who received an ovation on rising to respond on behalf of the Bench, at said that never before, looking down the table in the hall, had so many memories crowded upon him, so many causes come back to his mind which he thought he had forgotten, so many consultations, so many speeches. (Laughter.) They would forgive him, he was sure, if, in responding to the toast, he made the personal observation that he had always felt such success as he might have achieved had been in a very large measure indeed due to the support which he was fortunate enough to receive from the solicitors of the City of London. It was rarely, perhaps, that one was entitled to indulge in autobiographical reminiscences, but he could well recollect the time when he used to do work in his early days in courts far removed from the City, when he sighed for the moment to come, and seemed to sigh in vain, when he should appear in what was called a City case. No one was able to explain how the change came, but it did come to men at the Bar, and it was from the moment that he found himself recognised by the City solicitors that he began to climb the ladder. (Cheers.) He was not yet used to responding for the Bench—(Laughter)—he was always much more inclined to think of the Bar—for he was but a few months old as a judge. He had his reputation to make, he had his way to make, amongst the profession and the public. But, speaking as the representative of the judges, he desired to thank them for the kind and just allusions that had been made to his distinguished predecessor. (Cheers.) Lord Alverstone was one of his early friends at the Bar. It would always be remembered as one of his characteris-

tics that he was ever ready to hold out the hand of good fellowship and to give encouragement to any young man whom he thought to be deserving. (Hear, hear.) He should see Lord Alverstone within a very few days. and would convey to him their greetings, and they would be glad to know that his health had improved. (Cheers.) He would only mention one little incident concerning Sir Thomas Bucknil—(cheers)—to indicate his public spirit and his high-minded desire to serve the State. It was no secret now that he intended to resign at the beginning of the year. He (the Lord Chief Justice) asked him after consulting the Lord Chancellor, to remain on for a little while, as arrangements were being made for the Court of Appeal which would take away some of the judges from the King's Bench Division. He had made arrangements to go away, not expecting the ill-health which, unfortunately, had stricken him just lately, but he said that as long as he was wanted and it was for the public good he would remain. (Cheers.) He thought he was entitled to say that at the present moment the judges stood high in the esteem not only of the City but of the public, and that tney would bear comparison with the judges of any land. It was, after all, only a platitude to say that they were animated by the highest desire for the public good. He was sure that all those present, who had knowledge of the judges would appreciate that, but he as a new judge was able, perhaps to look at the subject from a fresher standpoint than his colleagues on the Bench. Every day that he took his seat on the Bench he felt the heavy responsibility of the position which he occupied and he was certain that all his brother judges had the same view, even though they might have served for many years. No one could sit in court having to determine cases upon the facts and the law without realising that a great burden was put upon him. His decision affected the welfare, it might be the fortunes, and sometimes the character of one of the litigants, and possibly of both. It was, therefore, of the utmost importance, in his judgment, that case that were brought before the courts should never be hurried. (Cheers.) The longer he sat on the Bench the more he was convinced that the greatest quality of a judge, leaving aside for the moment his capacity to deal with the law or the facts, was that of patience. He was impressed by the the necessity for quiet, careful, patient. deliberate hearing of all

that there was to hear, so that the parties might go away absolutely convinced that the decision was given according to the best ability, wisdom, and judgment of the judge. (Cheers.) At the present moment one no longer heard of arrears in the courts. They existed in the past, and they might possibly come again in the future, although he was a little inclined to doubt it. One thing that had impressed him during his occupancy of the Bench was the desire of the judges to meet any possible objection that there might be to the present system and to initiate reform wherever it was needed. It was quite a mistake to think that the judges were oposed to reform. On the contrary, they had a great deal of experience, and could very usefully co-operate in bringing about reform wherever they thought it was necessary, (Cheers.) Above everything, they as judges rested upon the assistance which they got both from the Bar and from solicitors, and it was to that harmonious co-operation, which had existed so long in this country; that they had to look. He had once been a Minister of the Crown, and Lord Haldane would forgive him if he said that to the public in general.the everyday life in the courts, the daily decision of causes, the pure and impartial administration of justice, was as important as that the country should have great Ministers. (Cheers).

Sir Robert Finlay, who responded on behalf of the Bar, said that the profession of the law more than any other profession was brought every day into contact with every feature of national life. This was particularly true of the Bar, which had in one of the tribunals before which it practised a still wider outlook. Before the Judicial Committee of the Privy Council the members ol the English Bar were brought into intimate relation with every part of the greatness of the Empire that the world had ever seen. (Cheers.) It was a wonderful tribunal, and anyone who wanted to realise the greatness of the Empire might well spend a few weeks there listening to cases from India, America, Africa, and all our dependencies. He would learn that every part of the Empire recognised that it was a tribunal to which it might appeal with a perfect certainty that justice would be done. It was one of the greatest assets of an Empire (Cheers). There was one institution which he hoped the profession would, never part with, and that was the long Vacation. (Laughter and cheers.) He had always envied the Scottish

Courts their vacations of six weeks in Spring—(laughter)—and he respectfullv suggested for the consideration of the exalted persons present the adoption of such a reasonable and modest reform in England—without prejudice to the Long Vacation in the Autumn. (Laughter). *Ibid*

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The Appellate Courts.—Appellants are fairly successful, in the Appellate Courts. Fifty of the 132 decisions reviewed by the Judicial Committee in 1912 were reversed or varied. In the House of Lords the percentage of success was somewhat lower; only 19 of the 59 appeals heard were allowed. But in the Court of Appeal, while 327 judgments or orders were affirmed, 263 were reversed or varied. *Law Journal March,* 14.

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Case Law: *Lord Bryce* Speaking at the Law Society's Hall said that Case law had often incurred reproaches from those who preferred the more abstract kind of law which was taught in Continental schools, but he believed there was a great deal to be said for our system from the point of view of the student, because in studying cases he was always kept in close touch with facts, and he learned from cases what was the relation between fact and law, and how facts ought to be studied. It had often been said that the law of England was wanting in symmetry, that it was very difficult to learn, and that a man got bewildered amongst the mass of cases, but it had always maintained the old quality of the Common Law of being in touch with the common people. The law should always keep pace with changes in social and economical questions. It ought always to be just a little behind the top of the wave of public opinion. It should never follow public opinion too fast, because public opinion must change; and he thought it might be said of our own time that the law was at least keeping abreast of what the public opinion of the day required. He did not think there was any profession in which a man could in the course of his professional work contribute so largely to the good of the community as could the lawyer. *Ibid.*

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'*The Bayard of the Bar.*' *Sir Edward Clarke*, who within the next few months will complete his fiftieth year at the Bar, has announced that he intends to mark the occasion by retiring

from practice. It is a professional career of rare merit and distinction which will thus be brought to a close, and it will occupy a high place in the annals of the English Bar not only because of the great forensic gifts, the robust and penetrating intellect, the polished eloquence and the chivalrous sense of fairness which Sir Edward Clarke has always brought to his work as an advocate, but also because of the courage and independence which he has conspicuously displayed in the wider field of public life. This is not the occasion on which to review minutely the high qualities of mind and character by which 'the Bayard of the Bar,' as Sir James Mathew once called him, has achieved his brilliant record as one of the greatest advocates of modern times. The Bar, for which he has an affection that is amply returned, may be trusted to organise some fitting tribute to him when the time of his retirement comes. We would only now express the hope that the public recognition of his long and distinguished career will take a form which will enable him—for he wears his seventy-three years lightly—to give the country the benefit of his learning and experience in the supreme tribunal of the Empire.—*Ibid March*, 21.

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Miscellany. Sir John Simon, speaking at the annual dinner of the Manchester Law Students' Society on March 13, referred, in a humorous speech, to the relations of the law to the general community. To the novelists, the dramatists, and other uninstructed critics, lawyers were men of diabolical acuteness who spent their time saying what they did not believe in order that they might make the worse appear the better reason for purposes entirely disgraceful and for remuneration invariably extortionate. The fact was, however, that lawyers were painstaking and industrious people, who spent more time in reconciling differences than in fomenting strife, who endured much unmerited obloquy, and without whom no Government was complete. There had never been a time in the history of this or any other country when, in a great crisis affecting constitutional liberty, the lawyer had not taken a great and striking part. A lawyer who found that the facts and arguments were against him would settle and compromise, and those were the real qualities of statesmanship. *Ibid*.

Procedure for the Ascertainment of Truth v. The "Sporting Theory of Justice."

A spirited attack on our contentious system of procedure, with all the rules of professional conduct which have grown up under it, the more notable because it came from a recognised leader of the bar, was made by Sherman L. Whipple of Boston, on Feb., 2, at the meeting of the Connecticut Bar Association.

Mr. Whipple's views were expressed in his address on "The Impairment of Popular Confidence in the Administration of Justice", at New London. Mr. Whipple arraigned the existing system, which he described as farcical and a relic of Middle Ages. The secrecies, suppression of the truth, and surprises in Court employed by Counsel, he said, must be eliminated.

"A trial in Court must be made to be a judicial investigation in which attorneys participate as officers of the Court, whose primary duty shall be that the truth shall be disclosed."

"I believe that the entire theory and method of our Court trials must be radically and fundamentally changed.

"The conception of a trial which dominates our present procedure is an inheritance from the Dark Ages.

"Our ancestors originated a forum which should become a substitute in the settlement of controversies of the prevailing forum of personal encounter. They sought to substitute intellectual skill and agility for fisticuffs and weapons. In this twentieth century the substitution has become almost complete, though to our regret and shame fisticuffs and weapons are still sometimes in evidence in the trial of causes.

"Most of the other characteristics of barbaric contest—concealments, secrecy, ambuscades, surprises and other tricks of the game, are still with ns. The grand strategy, as the game is played, is suddenly to surprise one's opponent with an unexpected witness, or claim, or ancient rule, and in the opponent's confusion and consternation run away with the verdict. The judge under the rules is a rather helpless reference, the lawyers the intellectual gamesters, the verdict or judgment the stake or prize of the contest.

"It is a time honoured maxim oft he law that secrecy is the badge of fraud; yet, from the moment when the client first consults his attorney and learns that he may safely confide in him

any guilty secret; secrecy is the prevailing characteristic of the entire conduct of the case. Client and witnesses alike are enjoined to silence, and throughout the trial; the attorneys sit discreetly withholding all disclosure. The whole atmosphere of the trial steams with discreet reserve and furtive concealment.

I repeat my belief that the instincts of the people are right. The machinery of our courts does not with unerring accuracy result in justice. It does not disclose and is not, as it should be, adapted to disclose the truth which is essential to justice. The system is a burden; it is archaic; it is outworn; it is unadapted to the standard of modern civilization.

" It is not to be wondered at that in their intense disgust and dissatisfaction at the court's performances, the people turn their thoughts to extravagant and unwise remedies.

" In the first place the central theory and purpose of any new system of procedure must be the unerring and speedy ascertainment of the truth. "

Mr. Whipple outlined his views on the new procedure, as follows:—

(1) " The characteristics of the game—the secrecy, the surprises, the ambuscades—must be eliminated.

(2) A trial in court must be made to be a judicial investigation, in which attorneys participate as officers of the court, whose primary duty shall be that truth shall be disclosed.

(3) " Any existing rule, or privilege, or law which tends to prevent the disclosure of the truth must go.

(4) " Absolute disclosure must be compelled on the part of every person within the reach of the court who has knowledge of material facts.

(5) " Every right or privilege must be subordinated to disclosure of the truth.

(6) " It must no longer be a duty of an attorney to help a client to conceal any fact which justice requires to be disclosed.

(7) Both parties, in advance of trial, must disclose the names and addresses of witnesses who have been interviewed with statements of what has been said at such interviews.

(8) " Instead of a formal declaration or complaint and instead of a formal answer, plaintiff and defendant shall recite all the facts and evidence in their possession.

(9) " The rules of evidence should be rationalized. Testimony now excluded because it is hearsay or otherwise should be admitted if it is evidence which would convince men in forming their judgments in human affairs.

(10) " The rule denying the right of a party to litigation to testify should be eliminated.

(11) " When the jury have reached a decision after being aided all that is possible by judge and counsel, the decision should be final.

" I think that there is a rational basis and reason for the popular feeling of dissatisfaction with the performance of our courts," said Mr. Whipple. "I believe that the courts really deserve the loss of popular confidence which they have suffered. I do not believe that the judges deserve the criticisms which are applied to them, and I do not believe that our profession is deserving of that measure of distrust which it now suffers."

These proposals drew a reply from Professor Taft at the banquet of the Boston University Law School Association on Feb. 5. He said

" If Mr. Whipple's ideas prevailed in the profession that we are in, with our confidential relations to our clients, it would take about a week to dispense with the services of the profession and certainly, if they were to prevail, the profession ought to go out of business.

" Why, we are not keeping the secrets of our clients. We are talking over secrets and advising wisely with respect to those things that if we were not engaged in the profession would be retained and not even be made the basis of good advice.

" One of Mr. Whipple's propositions was that we were going to abolish the rule relating to hearsay evidence. I was eleven years on the bench and it did seem to me that if there was one rule governing the trial of cases in the admission of evidence that tended to the sifting of truth it was the rule that excluded hearsay evidence and subjecting every witness to cross-examination.

" I don't know whether you can remember the shock that went over this country when the Dreyfus case was tried in Paris, and when they called witness after witness, who stood up and

swore that from the things they had heard they believed that Dreyfus was guilty. And that is the kind of evidence we are going to have in order to help the court rooms and to purge the profession of the little devils that are running under the tables in the court rooms.

" But the reputation of Massachusett' justice and the dispatch of that justice as compared with that in other states is not going to suffer by such an ill-advised statement in respect to it as has come from Mr. Whipple."

On the following day Mr. Taft referred to the subject again in the second lecture in his course at Boston University Law School on "Legal Ethics." He considered that "to require the disclosure of the confidential relations of counsel and client would destroy this profession. If a lawyer were forced to make disclosures it would destroy the duty of a lawyer to society in effecting compromises and in the avoidance of suits. How many persons would hire a lawyer if they regarded lawyers as detectives to investigate their case and then report the weak points to the Court? There are at present methods compelling each party to testify and the Courts and parties can now get all the facts. Clients should be able to talk with their counsel without the fear of a disclosure. Take away this protection and you altogether destroy the value or usefulness of our profession.

" Mr. Whipple's objection to hearsay evidence also is unfounded. The rules of evidence have been worked out after centuries of experience in Court, and instead of losing their force they are gaining all the time.

" There may be some changes needed in the system of evidence. I sometimes doubt whether the constitutional provision that 'no man shall be forced to be witness against himself' is a reasonable restriction as to the detection of crime. Society is entitled to protection. The first thing we do when a wrong is committed is to ask the person suspected. This is the rule the mother applies to the boy when she finds the jam pot violated."

Mr. Whipple, when shown a report of Mr. Taft's second lecture, made reply as follows:—

" While I respect Mr Taft's opinion very sincerely, yet in my judgment the features of secrecy in regard to the preparation of cases and their trial in Court must be abolished. A case must

be so prepared in a lawyer's office that if every word said was taken by a dictagraph, neither the lawyer nor the client nor the witness should have reason to blush for one word that had been said."

"Mr. Taft's position is in effect that something is more important in the trial of a cause than that the truth should be disclosed. In my judgment nothing is more important than the disclosure of the truth. Any rule or custom or law or ethical standard that prevents any person knowing the truth from disclosing the truth in court in the interests of justice, is indefensible."

Mr. Taft says in effect, that if clients could not disclose in confidence to their attorneys their guilty and filthy secrets with the assurance that they would be thus safe, our profession would be put out of business. This means that the necessary function of our profession is to receive confession of guilt or admissions that our client's claims are unjust, and still by failure to disclose the truth, attempt to show that the guilty client is not guilty, or that the client's unjust cause is a just one.

"Under such a standard of duty is it to be wondered at that the public have become inclined to believe that lawyers, in arguing as true things that they know are not true, or arguing as innocent a man whom they know to be guilty as insincere and dishonest?

"I am glad to say that I believe that the function of our profession in society and in the Court is a nobler one, and that the standards of honest conduct of high-minded men in the community are likely to be established as the standards of proper conduct of attorneys in court."

"I do not believe that lawyers will be obliged to go out of business if they are no longer permitted or required to conceal the truth, but, upon the other hand, are compelled, in the interests of justice to disclose the truth." *The Green Bag March*, 1914.

CONTEMPORARY LEGAL LITERATURE.

American judicial opinion seems to be divided as to the liability of persons for injuries negligently inflicted on trespassers. The Courts that follow the lead of Massachusetts hold that the

landowner owes no duty to the trespasser and is not liable in the absence of intentional injury while the other set of Courts which follow the view of the Michigan Court say that even a trespasser is not beyond the pale of law and any negligence resulting in injury renders the owner liable. Mr. Robert J. Peaslee discussing the question in the *Harvard Law Review for March* 1914, declares in favour of the latter view. He thinks that the former view is due to the sentiment that the tramp should not be put on the same footing as an invited guest and really involves a fallacy. Law has passed the stage of judging men's conduct in these matters by an internal standard. The standard applied is an external one, what a reasonable man would under the circumstances do. The precautions that a reasonable man would take would necessarily differ according as it is an invitee or a trespasser that is concerned. In no case, can he be expected to take precaution so as to prevent harm to an unseen trespasser. Nor would the application of such a standard involve the conferring of any right on the wrong doer. When you say that the defendant is negligent what you really mean is that the plaintiff's wrong was only the occasion for the committing of the wrong by the defendant. The view of the Michigan Courts applies the standard of reasonableness while the Massachussets view introduces an exception to the rule by the use of the confusing and philosophically meaningless term " intentional injury ".

Mr. Costigan discusses the classification of trusts and fundamental characteristics of each of the classes. He discards the classification of express and implied adopted by Lewin and Perry as unphilosophical, the distinction between the two classes of trusts being in substance only one between clear and less clear words. Both are cases of trusts created by express words. The only classification based on tangible distinction is according to him the one into Express, Resulting and Constructive trusts. Resulting trusts are trusts implied in fact by law. Constructive trusts are trusts implied in law. The usual kinds of resulting trusts are where a conveyance is made voluntarily, where a conveyance is made on trust but the trust is not declared at all or is not fully declared and where the conveyance is taken in one person's name and the consideration is supplied by another. Conveyance on uses having been a common feature at

one time, the law inferred a *use* whenever there was no special reason for holding that it was intended to be absolute. In America, the tendency seems to be to hold that no trust results when there is a conveyance for a stated consideration A constructive trust is one where the Court holds that a man should not be allowed to unjustly enrich himself at another's expense. The jurisdiction is based on fraud real or constructive. The writer thinks that the usual method of classifying the trust inferred in the case, say of a sale to the wife with an oral declaration of trust which is inoperative owing to the Statute of Frauds but which is admitted to rebut the inference of advancement, under the heading of resulting trust. He thinks that properly speaking, such a trust should come under constructive trust.

A note by the Editor of the Medico—Legal Journal for June 1913, discusses the connection between Temperature and crime. Though there seems to be a slight rise in crimes of violence during the hotter portion of the year, there is little real connection between the two, at any rate the weather certainly can never attain the dignity of a criminal defence.

Mr. John Ross Passos of the New York Bar puts in a strong plea in favour of the accused being required to be the chief witnesses in criminal cases. One accused of crime should be treated liberally, he says, but maxims which enable or aid the guilty to escape should be abolished. The innocent are too happy to go upon the witness stand and especially would this be the case if cross-examination were limited to the meterial facts of the case. A privilege whose roots can be traced to the ecclesiastical system which prevailed centuries ago in England has no place in the free and cultivated soil of American Law and its extirpation will be hailed by the legal fraternity and the lay public as the first decisive step in the progress of law reform.

"Four things" said Socrates "belong to the Judge: to hear courteously, to answer wisely, to consider soberly and to decide impartially" Adds Mr. J. C. McWhorter (in the American Law Review, January-February) four things belong to the lawyer: to be courteous at all times, to be honest in all things, to be faithful to all clients and above all to be true to those higher demands of an exalted profession and of the public which such

profession first of all must serve. The writer appeals to the lawyers to be courteous to witnesses, not to bully them or indiscriminately abuse them. No lawyer in testing a witness on cross-examination ought to make him feel the sting of a cruel humiliation. The witness who is so abused and humiliated never gets over it. To the very end, he carries a bitter resentment against the lawyer, the Court and the legal system that allowed it. The establishment of the People's Court in Germany and the Debtor's Court in Kansas from which lawyers are excluded represents a powerful protest against the methods and procedure in which lawyers appear. The pouncing upon every witness and under one pretext or another, holding him up to scorn, ridicule and public contempt, discredits the machinery of justice and makes the public shun the witness box. Part of the responsibility for this rests on Judges. As Bentham says—" Browbeating is a sort of offence which can never be committed by any advocate who has not the judge for an accomplice. The writer also says that in the name of courtesy, courtesy to the Bar, courtesy to the Bench and by the Judges towards each other much injustice is done to the public. Justice is delayed in some cases, and defeated in others. The writer vigorously protests against such "abuses of courtesy."

BOOK REVIEWS.

Mahomedan Personal Law, according to the Hanafite School, by Mohammad Kadri Pasha, translated by Wasey Sterry M. A., Barrister at Law and N. Abcarius Ph. M., L.L.B., 1914. Spott is Woode and Co., Ltd., New Street Square, E. C.

In recent years the literature on Mahomedan Law, available in English, has been steadily growing and the above volume published under the auspices of the Sudan Government is, though modest in aim, not without its usefulness. Readers of Mr. Abdur Rahman's " Institutes of Mussalman law " will find the scheme of the present volume familiar. A Code of Mussalman law was prepared more than thirty years ago by a Council of *Ulemas* commissioned by the Egyptian Government, under the Presidency of Kadri Pasha and the present volume is a translation of that code. Intended for the use of British Magistrates in the Sudan, the book contents itself with an accurate but readable translation of the

code without being encumbered by any notes or references to original authorities; and there is of course no reference to any case law. The work covers the whole of what is ordinarily classed as "Family law," *viz.* the subjects of Marriage and Divorce, Sonship and Guardianship and Inheritance, and there are also two sections on Donations *inter vivos* and Wills. There is at the end of the book a useful table of inheritance from which the shares of different heirs in different contingencies may be quickly ascertained. It is scarcely necessary to add that the get up of the book is all that could be desired.

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All India Century Digest (*Civil*) 1811—1912 by Mr. B. R. Desai, High Court Pleader, Baroda, Vol. II. This volume brings us to the end of Mr. Desai's Century Digest (Civil) Mr. Desai deserves to be congratulated for the promptness and thoroughness with which he has carried his vast undertaking to a successful issue. We have already expressed our appreciation of the plan and work of Mr. Desai as we were noticing the earlier volumes and we are glad to say that larger acquaintance has not given us any ground for revising the opinion already expressed by us, on the other hand we think it no exaggeration to say that with these volumes of Mr. Desai and the Companion Index volume which we shall presently notice, it should be easy for any practitioner to collect the case law on any given subject at the shortest possible notice with few chances for omissions.

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Desai's Point noted Index of cases by Mr. B. R. Desai, Pleader, Baroda, 1914. Price, Rs. 12. Mr. Desai's Index has become so well-known to the profession that we need hardly dwell upon its many points of excellence. We note with pleasure the attempt made to classify cases according to points on which each case has been followed, distinguished &c. which cannot fail to enhance the utility of the book.

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Mayne's Hindu Law and usage, 8th Edn. by Sir C. Sankaran Nair.

Published by Messrs. Higginbotham & Co., Mount Road, Madras, Price, Rs. 20. Mayne's book has become a classic and any interference with its text is a sacrilege. Some such idea has prevented the publishers from availing themselves of the advantage of a thorough reirsion by the Editor who by his erudition and

experience as a judge was eminently fitted for the task. Whatever the wisdom of the course adopted from the point of view of sentiment, we cannot help thinking that a splendid opportunity of bringing Mayne up to date has been thrown away from considerations of sentiment. Many of the opinions of Mr. Mayne, as rightly observed by Sir C. Sankaran Nair, require reconsideration in the light thrown by the Sacred Books of the East since published. As it is, we can only hope that the Publishers and the Editor will soon find their way to bring out a thoroughly revised edition of Mr. Mayne's book. With many ambitious rivals in the field, even from a business point of view such a course might be not altogether unnecessary. Subject to these remarks we welcome this edition of Mr. Mayne's book. We see that no pains have been spared to note up all the cases with additions to the text and the footnotes whenever necessary. Omission of a fuller reference to non-official journals may be felt by some to be a disadvantage, but on the whole it cannot be said to detract from the usefulness of the work. The book has been made more handy though we see that there are more pages in this than in the last edition. The get up is excellent and fully up to the level of the previous editions.

The Madras Law Journal

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WIDOW'S ALIENATOINS.

The 'glorious uncertainty' of the law is illustrated by the present state of the law in India regarding alienations by a Hindu female with the consent of reversioners. Attention has been drawn to the subject in these pages on former occasions (see 16 M. L. J. 243; 19 M. L J. 7; 20 M. L. J. 342). Since the last of them, there have been quite a number of reported cases under this most prolific topic, exhibiting much the same variety of judicial opinion as before Amongst them, we desire to direct particular attention here to the judgment of a Full Bench of the Calcutta High Court in *Debi Prosad Chowdhury* v. *Golap Bhagat*[1] and to some observations of the Judicial Committee in a very recent case in *Bijoygopal Mukerji* v. *Girindra Nath*[2] But reference may usefully be made in this connection, also to the decisions of the Madras High Court in *Kuppier* alias *Venkatasubbier* v. *Kotta Chinnasami Iyer*[3] *Raghupaty* v. *Kannamma*[4] *Brahmanaikudu* v. *Mahalakshmi*[5] and *Arthanari Goundan* v. *Ramasami Goundan*[6]

The Calcutta Full Bench case deserves special attention on account of the eminence of counsel who argued the case and the thoroughness of the arguments (as reported) as also in view of the strength of the Bench that took part in the decision. Here too, as in the Madras Full Bench case, *Rangappa Naik* v. *Kamti Naik*[7] there are differences between the learned Judges on certain points, including the exact basis of the decision of the Judicial Committee in *Bajrangi Singh's*[8] case and its bearing on what may briefly be called the 'consent' theory and the 'relinquishment' theory. The judgment of *Mookerjee J.* clearly shows that so far as the Judgments of the Privy Council are concerned there is no such inconsistency between the earlier and the later cases as is suggested in some of the Madras judgments. The two lines

1. (1912) I. L. R. 40 C. 721.
2. (1914) 18 C. W. N. 678.
3. (1911) 22 M. L. J. 488.
4. (1912) 23 M. L. J. 363.
5. (1912) 24 M. L. J. 583.
6. (1913) 25 M. L. J. 8.
7. (1908) I. L. R. 31 M. 366.
8. (1907) I. L. R. 30 A. 1 (P. C.)

of cases *viz.*, those relating to the consent of reversioners and those relating to 'relinquishment' in favor of reversioners, are distinct and rest on distinct grounds; and the learned Judge it is submitted, rightly, points out that if this distinction is borne in mind, there is no difficulty in appreciating the observations in *Bajrangi Singh's* [1] case. So far as Bengal is concerned, a certain amount of illogicality and confusion had been introduced by a long course of decisions which the Full Bench in *Nobokishore's* case [2] was not prepared to depart from; but no such difficulty exists in the other parts of India.

Summarising the result of the authorities, *Justice Mookerjee* lays it down that the effect of the consent of reversioners to an alienation by a widow is to raise a presumption, which is rebuttable, that the transfer was for a proper purpose or that the transferee had made *bona fide* enquiries and satisfied himself as to the necessity for the transfer. In this view of the law—which applies equally whether the transfer is of the whole or only of a part of the estate—all the learned Judges who sat on the Full Bench agree. This is the view of the Bombay High Court still and of the Allahabad High Court also (see *Ramkrishna Kuppuswami* v. *Tripurabai* [3]. *Abdulla* v. *Ram Lall* [4]. The Madras High Court is alone in the view that the consent of reversioners is more than presumptive evidence of the propriety of the transaction. *Kuppier* alias *Venkatasubbier* v. *Kota Chinnasami Iyer* [5]

It must be said that in the Madras decisions, the 'relinquishment' theory and the 'consent' theory have not always been sufficiently kept distinct. Nor have the Bombay and Allahabad decisions subsequent to *Bajrangi Singh's case* [1] made any attempt to re-consider the question on principle. In *Pilu* v. *Babaji* [6] the Bombay High Court observed generally that the principle of the rule as to the efficacy of reversioners' consent rendered it ordinarily applicable only to alienations *for value* and the Allahabad High Court followed that view in several cases (see *Abdulla* v. *Ram Lall 3 Sarnam Kanwari* v. *Raghunath* [7] *Beni Madho Singh* v. *Jagat Singh* [8]). This statement is in any view not quite accurate; for even as *evidence*, the reversioner's consent may be relied on in

1. (1907) I. L. R. 30 A. 1 (P. C)
2. (1884) I. L. R. 10 C. 1102.
3. (1911) 13 Bom. L. R. 940.
4. (1911) I. L. R. 34 All. 129.
5. (1912) 22 M. L. J. 488
6. (1909) I. L. R. 34 B. 165.
7. (1912) 16 I. C. 187.
8. (1912) 16 I. C. 337.

support of the *propriety* of the transaction, though it may not be a transfer for value,as for instance when a widow gives property to a daughter at the time of marriage. This in substance was the case in *Abhesing Tirabhai* v. *Raising Fatisinghagh* [1]. But in dissenting from this view of the Bombay High Court, the Madras High Court went to the opposite extreme, on the assumption that the rule as to the effect of the consent by the reversioners is not a mere rule of evidence but a rule of *law*, without *any* reference whatever to the nature of the transaction assented to. *See Kuppier* alias *Venkatasubbier* v. *Kotta Chinnasamier*[2] *and Raghupathi* v. *Kannammal* [3]. The extreme limit in this direction is represented by the view of ***Sadasiva Aiyar, J.*** in *Raghupathy* v. *Kannamma*[2] and *Arthanari Goundan* v. *Ramasami Goundan* [4], who —in seeking out and applying what he considers the 'implication' of their Lordships' judgment in *Bajrangi Singh's case* has overlooked the express statement therein that they have no wish to extend the widow's power of disposition.

We venture to think that the decision in *Bajrangi Singh's case* has no bearing on the law as to surrender or relinquishment, that as laid down in *Behari Lal's* case[5] a surrender can be effective only when it covers the whole estate inherited by the widow from the husband and that it cannot be availed of as a mere contrivance to secure an indirect benefit to the widow herself (see the opinions of *Jenkins C. J.* and *Mookerjee J.* in the Calcutta F.B. case). Even *Harrington* and *Stephen, JJ.* who do not quite agree with *Jenkins C. J.* and *Mookerjee J.* on this point, recognise that an alienation, by which the widow receives money in lieu of the property, cannot reasonably be treated as a 'surrender.' And cases like *Challa Subbiah Sastri* v. *Paluri Pattabhiramayya* [6] *Arthanari Goundan* v. *Ramasami Goundan* [7] are equally hard to justify on the footing of 'surrender, having regard to the proved object of the transaction there in question. The object or purpose would be relevant to the decision of the question whether the transaction is really a surrender.

The Madras view that the decision in *Bajrangi Singh's* case lays down a rule of estoppel (as distinguished from validation),

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1 (1909) 16 I. C. 561.

2 (1912) 22 M. L. J. 488.

3. (1912) 23 M. L. J. 363.

4. (1918) 25 M. L. J. 8.

5. (1891) I. L. R. 19 C. 286

6. (1907) I. L. R. 31 M. 4

7. (1918) 25 M. L. J. 8,

does not appear to have been adopted by the Calcutta or Allahabad High Court, though a rule of estoppel in similar circumstances is recognised by the Bombay High Court. per *Ranade J.* in *Vinayak* v. *Govind*[1] and *Ramkrishna Kuppuswami* v. *Thripurabai*.[2] Some remarks on this aspect of the question will be found in 19 M. L. J. 7 and 20 M. L. J. at p. 344. where reference is made to the decision of the Judicial Committee in *Lala Rup Narain* v. *Gopal Devi* [3] as in a manner inconsistent with this view.

That the Judicial Committee look upon the consent of reversioners only as *evidence* (it may be, strong evidence) of the propriety of the transaction, is, it is submitted, fairly made clear by the course of the judgment and also some of the observations in the recent case of *Bijoy Gopal Mukerjee* v. *Girindra Nath* [4]. Their Lordships say, the case is one that "depends entirely on the facts and that it raises no new question of law as to the powers of a Hindu widow to deal with family property in case of necessity with the consent of then present 'reversioners'; and towards the end of the judgment, they observe that it has "always been a feature of Hindu Law as administered by this Board to attach great weight to the sanction by expectant reversioners of an alienation of property by a Hindu woman as affording evidence that the alienation was under circumstances which rendered it lawful and valid."

In the course of the argument, reference appears to have been made both to *Nobokishore's case* and *Behari Lal's case* on the one hand and to *Bajrangi Singh's case* and *Debi Prasad's case* on the other, but the judgment makes no reference whatever to any of them, either by way of explanation or by way of approval or disapproval.

With reference to the decision in *Mallik Sahib* v. *Mallikarjunappa* [5] it may be pointed out that the learned Judges make no reference to the decision in *Vrijivan Rangji and others* v. *Ghelji Gokaldas and others* [6] which in similar circumstances, held the transaction invalid, as the consenting heir was a woman, though, under the Bombay Law, she (being the daughter) would take an absolute estate.

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1. (1903) I. L. R. 25 B 129
2. (1911) 13 Bom L. R 940.
3. (1909) I. L. R. 36 C. 780.
4. (1914) 18 C. W. N. 673
5. (1913) 15 Bom.L. R. 1142.
6. (1881) I L R. 5 B. 563

SUMMARY OF ENGLISH CASES.

G. & C. Kreglinger *v.* New Patagonia Meat and Cold Storage Company, Limited: (1914) A. C. 25.

Mortgage—Clog on the equity of redemption—Doctrine of—Statement of the rule—Stipulation for mere collateral advantage, not oppressive, good.

This is a very important decision of the House of Lords on the doctrine of *clog on the equity of redemption*, "the unruly dog" as Lord Mersey calls it "which if not securely chained to its own kennel is prone to wander into places where it ought not to be".

The jurisdiction which the Courts of Equity sought to exercise in respect of mortgages was only a special application of the more general power which it claimed to relieve against penalties and to mould them into securities. The end to which the Courts of Equity interfered was to ascertain the real nature of the transaction and to put it on that footing. It was in ordinary cases only where there was conduct which the Court of Chancery regarded unconscientious that it interfered with freedom of contract. As established, the doctrine was expressed in three ways (i) once a mortgage always a mortgage; if a transaction was once found to be mortgage, it must always continue to be treated as such and nothing else (ii) the mortgagee should not stipulate for any collateral advantage which would make the remuneration for the loan exceed a proper rate of interest (iii) a mortgage cannot be made irredeemable and any stipulation which clogs or restricts the equity of redemption is void. Rule (ii) proceeded upon the footing of usury laws and had no application to cases where the mortgage was given for the performance of an undertaking as distinguished from payment of a loan. With the repeal of usury laws, it has operation only to this limited extent, viz:, that an agreement for a collateral advantage is bad if it is oppressive or in effect clogs the equity of redemption.

Plaintiffs were a firm of merchants and wool-brokers; defendants were carrying on the business of preserving and canning meat in the course of which they had at their disposal a large number of sheepskins. Plaintiffs advanced £10,000 to the

defendants with a floating charge on their undertaking. Plaintiffs were not to demand repayment till 1915 but defendants had an option to pay earlier. The defendants gave an option to the plaintiffs to purchase their sheepskins till 1915 irrespective of the fact whether the mortgage was redeemed. The question was whether this provision as to option was not a clog on the equity of redemption and void. Reliance was placed on the dicta of Lords Macnaghten, and Davey in *Bradley* v. *Carrit*[1] for the position that any provision which gave the mortgagee a collateral advantage beyond the duration of the mortgage was a clog and was void. Their Lordships held differing from those expressions of opinion, that there was no such rule, that the clause in question gave the mortgagees a collateral advantage and not being oppressive and not also having the effect of clogging the equity of redemption was binding.

The following observations of *Haldane, L. C.* on the authority of precedents are worth noting

"To follow previous authorities, so far as they lay down principles, is essential if the law is to be preserved from becoming unsettled and vague * * * But when a previous case has not laid down any new principle but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances and to erect a previous decision into a governing precedent merely on this account. To look for anything except the principle established or recognised by previous decisions is really to weaken and not to strengthen the importance of precedent."

As instances of clogs on the equity of redemption, *Lord Parker* gives the following stipulation that if default were made in payment of the money secured on the date specified the mortgagor should not exercise his right to redeem or a stipulation that he should only exercise it as to part of the mortgaged property or on payment of some additional sum or performance of some additional condition.

Viscount Haldane, L. C. held that the rules above referred to would, apply whether the mortgages are legal mortgages or equitable mortgages.

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1. (1903) A. C. 253.

Colonial: Gold Reef, Limited *v.* **Free State Rand, Limited**, 1914, 1 Ch. p. 382.

Company — Articles of Association — Construction — Proxy — Foreign Company having no seal—Appointment by Corporation—Companies' Consolidation Act, 1908, *S.* 68.

Under S. 68, Companies Consolidation Act, the vote given by a representative of a Corporation which holds shares in a Company, appointed as such by a resolution of the Corporation can be accepted, if the Chairman of the meeting of the Company's share-holders is satisfied of the resolution on a copy of the same being produced. Where a Company's Articles of Association provided that the writing by which a proxy is appointed by a Corporation should be under its common seal, and a Foreign Corporation which had no common seal under the law of its Country appointed a person its attorney by an instrument signed by two of its Directors and the Secretary, in the presence of two witnesses before a Magistrate whose seal was affixed to the same and the person so appointed attorney constituted himself the proxy of the Corporation, *Held* the vote by him as proxy was valid. The rule as to affixing of common seal only applied to Corporations which under the law had a common seal.

In re **Jefferey, Nassey** *v.* **Jefferey**, 1914, Ch. p. 375.

Will—Latent ambiguity—Gift to "brother his wife and their daughter,"—Five daughters in existence,—Which of them was intended to be benefited,—Division into three shares.

The testatrix bequeathed her residuary personal estate between "my brother Walter Jefferey, his wife and their daughter." Walter Jefferey had by his wife five daughters; *Held,* extrinsic evidence could be let in to clear the latent ambiguity and to show which of the daughters was intended to take. In the case evidence was given to show that the testatrix was particularly attached to Phoebe and that the testatrix had prior to this will made another will which she subsequently revoked by which she bequeathed the residue between her brother Walter Jefferey and "his daughter Phoebe." On the question of the share which each of the legatees got under the will, *Held,*

that each of the legatees was entitled to a third share under the will. The ordinary rule that a man and his wife only take one share rests on the doctrine of English Law that a husband and wife are for most purposes one person. The rule being purely one of construction, in the present case, the "and" being placed only before "their daughter" and not also between "Walter Jefferey" and "his wife," there is an enumeration of all the legatees and they take in three equal shares.

S. V. Nevenas & Co. *v.* Walker and Foreman.—1914, 1 Ch. p. 413.

Restraint of trade—Terms of employment—Severance of good from the bad terms—Manager—Meat importing agency—Reasonableness of time limit—Unreasonableness of area and purpose—Restriction throughout the United Kingdom.

Where a Company carrying on the business of meat importing agency entertained a person as the Manager of the business on terms one of which was as follows, "the Manager shall not for *a period of one year* from the determination of this agreement, whether by effluxion of time or in any other way whatsoever, either solely or jointly with or as agent for any other person, firm or Company directly or indirectly carry on or be engaged, concerned or interested in carrying on within the United Kingdom the trade or business of importer of meat or *any other trade or business similar to any trade or business* carried on during the period of his employment by the Company &c." *Held*, (1) Where two parts of a covenant are expressed in such a way as to amount to a clear severance by the parties themselves and as to be substantially equivalent to two separate covenants, the good part is enforceable notwithstanding its collocation with a bad part. The observation of Lord Moulton at p. 745 in *Mason* v. *Provident Clothing and Supply Co.* [1] is not to be understood as contravening the above rule.

2. A covenant obviously unreasonable as to its purpose or area, is not saved by reason merely of its reasonableness as to time.

3. To preclude a former servant from carrying on his natural business in any part whatever of the United Kingdom is a very strong step and requires exceptional justification.

1. (1913) A. C. p. 724.

Mitchell v. Mosely, 1914. 1 Ch. p 438 (C. A.)

Deed,—Construction—Mines and minerals,—Conveyance of reversion—Mining lease—Apportionment of rent—Real Property Limitation Act, S. 9.

A conveyance of land passes, unless we find something to the contrary, everything down to the centre of the earth. The grant of the land includes the surface and all that lies supra—houses, trees and the like—*cujus est solum ejus est usque ad caelum*—and all that is infra, *i e.* mines, earth, clay &c.

Where the defendants, the owners of lands gave a mining lease in 1740 for 200 years reserving an annual rent and they subsequently in 1791 and 1828 conveyed some of the lands to which the mines were subjacent, to the plaintiff, the defendants had been receiving the whole of the rent from the mining lessees from 1740 to the date of the action in 1912. The action was for a declaration that the plaintiff is entitled to the mines and minerals under the premises comprised in her conveyances subject to the mining lease and for an account and for payment to her of the proportionate rents under the mining lease. The defendants pleaded in answer. S. 9 of the Real property Limitation Act under which the cause of action for the suit commenced when the rent was first received by some person wrongfully claiming to be entitled to the land or rent. *Held*, the receipt of the whole rent by the defendants, prior to any legal apportionment of the rents between the owners of the reversion, was not receipt by a person wrongfully claiming the rent and so time had not commenced to run against the plaintiffs. The plaintiff can only recover as money had and received, rent for 6 years prior to the action.

Eastes v. Russ, 1914 I. Ch. p. 468 (C. A.)

Restraint of trade—Contract of service—Construction—Microscopis in pathological laboratory—Restraint for life—Area of restriction—Reasonableness.

The case of a mere contract of service stands on a different footing from an agreement made to protect the sale of a goodwill or to guard against the disclosure of special trade secrets. A restraint in a mere contract of service is invalid if it goes beyond what is necessary for the protection of the employer; and this depends on the character of the business. Where the defendant

entered the plaintiff's service as a microscopist in the plaintiff's pathological laboratory and one of the terms of the employment was that the defendant was "not to engage in similar work within a distance of 10 miles from these laboratories, either for himself or on behalf of any other institution of a like character under a penalty of £250." *Held,* this was a restriction from engaging in that trade not merely during the service under the plaintiff but for the period of the defendant's life.

Held, Cozens Hardy M. R. & Pillimore. L.J; Swinfen Eady L. J. dissenting. The restriction was unreasonable and should not be upheld.

BOOK REVIEWS.

A Treatise on the Law relating to Debentures and Debenture holders by Paul Frederick Simonson, M. A. Effingham and Wilson, London. Fourth Edition. Mr. Simonson has brought out a new edition of his valuable book on the branch of Company law relating to the issuing of Debentures and the rights and remedies of Debenture holders. The learned author has dealt with the law under two heads the first relating to trading Companies which are mainly governed by their respective memoranda and articles of association and the first Companies Act of 1862 and the Companies Clauses Consolidation Act 1908; and the second relating to Debentures created by Public Companies and Local Authorities, created by Special Acts of Parliament for carrying out certain specified purposes. The powers and rights of corporate bodies of the second class are governed by the Companies Clauses Act of 1845 and various other similar acts as also by the Special Acts of incorporation creating them.

The learned author's treatment of the subject is very thorough. His clear enunciation of the principles governing the law and his lucid analysis of the case law relating thereto leave very little to be desired.

Whenever we had occasion to refer to it, we have found the book useful; the exposition and criticism of the law as laid down already and suggestions relating to matters not covered by any precedent are very instructive. The Index attached to the

book is copious and exhaustive. The learned author has also given in an appendix the forms relating to the various classes of debentures. We are confident that the book will be found useful by all who may have any occasion to refer to the same. With the almost complete assimilation of Company law in India to that obtaining in England, the work is bound to be as useful here as in England. Corresponding sections between the English Companies Act, 1908, and the Indian Act of 1913 is another useful feature which will greatly facilitate reference.

The Law relating to the Reconstruction and Amalgamation of Joint Stock Companies by Paul Frederick Simonson, M. A. Second Edition, I Effingham andWilson **54** ***Threadneedle Street, London E. C. Price*** **10** ***s.*** **6** ***d.***

Mr. Simonson has also brought out a new edition of his law relating to the re-construction and amalgamation of Companies.

This is as it were a commentary on Ss. 120 and 192 of the Companies Consolidation Act, 1908, corresponding to sections 153, 213 and 214 of the Indian Companies Act of 1913.

Like his other publication dealing with the Law of Debentures, we are quite certain that this book will be found very useful especially to those concerned with the promoting and organising of Companies.

Simonsons' Law relating to the reduction of share capital. Effingham and Wilson. This is a new work recently published by Mr. Simonson. We are sure the book will be found useful by all who may have any opportunity to refer to the same.

End of Vol. XXVI.